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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

D.R. HILL, Warden et al., *Petitioners*,

v.

TOUFIC BADIH NADDI, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a court precluded from considering psychiatric evidence in determining whether waiver of the constitutional right to counsel is knowing and voluntary?

2. Is the retrial of a criminal defendant necessarily compelled in every instance where the defendant's right to self-representation has been erroneously denied?

LIST OF PARTIES

D. R. Hill, Warden of Tehachapi State Prison, and Daniel E. Lungren, Attorney General of California are the Petitioners in this Petition for Writ of Certiorari.

The United States Court of Appeals for the Ninth Circuit issued an unpublished opinion on June 9, 1998, which is the subject of this request for review.

Toufic Badih Naddi, a state inmate serving a sentence of life without the possibility of parole for the murders of his wife, her mother and father, as well as his wife's cousin and her sister's husband, is the Respondent and real-party-in-interest in the underlying proceeding.

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CITATIONS OF OPINIONS AND ORDERS

People v. Naddi, Case No. D013123, an unpublished opinion filed January 7, 1994, by the California Court of Appeal, Fourth Appellate District, Division One, affirming the judgment of conviction.

Naddi v. D. R. Hill, Case No. 95-CV-00022 J (AJB), an unpublished order, filed on April 29, 1996, by the United States District Court for the Southern District of California denying Naddi's petition for writ of habeas corpus as to all but one of the contentions raised by him and granting the writ of habeas corpus on the basis of Naddi's contention he was denied his right to self-representation.

Naddi v. D.R. Hill, Case No. 95-CV-00022 J (AJB), an unpublished order filed May 16, 1996, denying Petitioner's motion for reconsideration.

Naddi v. D. R. Hill, Case No. 96-55755 and Case No. 96-55791, an unpublished opinion filed June 9, 1998, by the Ninth Circuit Court of Appeals affirming the

judgment of the District Court denying the writ of habeas corpus as to all but one of Naddi's claims and granting the writ on the basis of Naddi's claim he was denied his right to self-representation.

Naddi v. D. R. Hill, Case No. 96-55755 and Case No. 96-55791, an order filed July 27, 1998, denying Petitioner's Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc.

STATEMENT OF JURISDICTION

On June 9, 1998, the Ninth Circuit Court of Appeals issued an unpublished opinion in Naddi v. D.R. Hill, Case No. 96-55755 and Case No. 96-55791, affirming the District Court's partial denial of Naddi's petition for a writ of habeas corpus and granting of the writ on the basis of Naddi's claim he was denied his right to self-representation. On July 29, 1998, the Ninth Circuit Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc. This Court has jurisdiction to review the Court of Appeals' opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

The Sixth Amendment of the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

28 United States Code, § 2254, subdivision (a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On October 15, 1985, Naddi was charged with five counts of murder with the use of a firearm. Multiple murder as a special circumstance was additionally alleged and the District Attorney sought the death penalty.

On December 20, 1985, Naddi changed his previously entered plea of not guilty to a plea of not guilty by reason of insanity.[1]

On March 17, 1986, criminal proceedings were suspended pursuant to California Penal Code, § 1368 based upon doubt regarding Naddi's mental competency

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1. The evidence of Naddi's guilt was overwhelming. In addition, Naddi confessed on numerous occasions to killing his wife and her four family members. The only issue of consequence in the case was whether Naddi was sane at the time he murdered his wife and four of her relatives.

to stand trial. The trial court thereafter found Naddi incompetent to stand trial and Naddi was sent to a state mental hospital.

Thereafter, the court found Naddi competent to stand trial and criminal proceedings resumed. After criminal proceedings resumed, Naddi was appointed new counsel, at his request. Naddi's new counsel expressed a doubt as to his competency to stand trial and criminal proceedings were again suspended.

On March 10, 1987, a jury found Naddi competent to stand trial. On April 8, 1987, Naddi was granted his right to represent himself, after making a request to do so and criminal proceedings resumed.

Criminal proceedings were suspended a third time based upon doubt regarding Naddi's mental competency to stand trial. At this time, the court reexamined Naddi's waiver of his right to represent himself. After considering expert testimony on the question, the court suspended Naddi's right to self-representation.

On February 11, 1988, a jury found Naddi competent to stand trial.

On June 8, 1988, a jury convicted Naddi of five counts of first degree murder. Multiple murder special circumstances and the special allegations pertaining to firearm use were found to be true.

A subsequent sanity trial resulted in a mistrial when the jury was unable to reach a verdict. A second sanity trial also resulted in a mistrial after a finding by the court that the prosecutor made objectionable comments in closing argument. On September 29, 1989, before the jury for the third sanity trial was empaneled, the court expressed a doubt as to Naddi's competency to stand trial. The court suspended criminal proceedings and the jurors were discharged due to the court finding they would suffer a hardship if asked to continue service. On October 30, 1989, Naddi was found competent to stand trial. The

third sanity trial thereafter began and resulted in a mistrial due to jury misconduct. A fourth sanity trial resulted in a finding that Naddi was sane when he committed all five murders. Throughout the guilt and sanity phase trials, Naddi continued to sporadically request to represent himself. His requests were denied in every instance. By this point, Naddi had been represented by twelve different attorneys, with almost all replaced for the reason that he believed they were in collusion with the prosecution. At times, his delusions included employees working for these attorneys, such as investigators.

Since the District Attorney was seeking the death penalty, the penalty phase of Naddi's trial began next. On July 9, 1990, the jury returned a verdict of life without the possibility of parole. On September 17, 1990, Naddi was sentenced to state prison for life without possibility of parole. Naddi appealed and the California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment of conviction. On January 7, 1994, the state appellate court held that Naddi was properly denied his right to represent himself as there was "substantial psychiatric evidence showing he lacked that competency." People v. Naddi, Case No. D013123; Appendix at A-26 - A-27.

The California Supreme Court denied Naddi's petition for review and Naddi filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of California (hereinafter "district court"), claiming, inter alia, as he had in state court, that he was denied his right to self-representation at trial, in violation of Faretta v. California, 422 U.S. 806 (1975). On April 29, 1996, the District Court, rejecting Naddi's other claims for relief, granted the writ of habeas corpus on the basis of Naddi's contention he was denied his right to self-representation. Naddi v. Hill, Case Number 95-CV-0022 J (AJB); Appendix at A-38. On May 16, 1996, the district court

denied Petitioner's motion for reconsideration. Naddi v. Hill, Case No. 95-CV-0022 J (AJB); Appendix at A-77.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit and the Court of Appeals affirmed the order of the District Court. The Ninth Circuit held that the District Court correctly granted the writ on the basis that Naddi was denied his right of self-representation. The Ninth Circuit based its decision on the fact that Godinez v. Moran, 509 U.S. 389 (1993) held there is no distinction between competency to stand trial and competency to waive the right to self-representation. The Ninth Circuit concluded that, by implication, Godinez holds that psychiatric evidence should not be considered in making a determination of whether a defendant has actually made a knowing and intelligent waiver of counsel. The Ninth Circuit also held the denial of Naddi's right to self-representation required reversal. Naddi v. Hill, Case Nos. 96-55755 and 96-55791; Appendix at A-82. Both parties filed timely petitions for rehearing and suggestions for rehearing en banc. On July 27, 1998, the Ninth Circuit denied the petitions and rejected the suggestions for rehearing en banc.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari in order to secure uniformity of decision regarding an important and reoccurring issue of constitutional law. Relying on this Court's decision in Godinez v. Moran, 509 U.S. 389 (1993), the Ninth Circuit has concluded that a trial court is precluded from considering psychiatric evidence in determining whether a criminal defendant's waiver of the right to counsel is knowing and voluntary. Naddi v. Hill, Appendix at A-82 - A-83. In contrast, other federal courts have relied on such evidence in evaluating the validity of a defendant's waiver of the right to counsel.

1. **A Trial Court Should be Permitted to Consider Psychiatric Evidence in Determining Whether a Defendant's Waiver of the Right to Counsel is Actually Knowing and Voluntary**

In Godinez, this Court concluded that the competency to waive the right to counsel is not a higher standard of competency than is required to stand trial. Godinez, 509 U.S. at 391. While a defendant who is competent to stand trial is therefore also competent to waive the right to counsel, a trial court's duty of inquiry does not end with a finding of competency to stand trial. The trial court must satisfy itself that the waiver of constitutional rights is also knowing and voluntary. Godinez, 509 U.S. at 400.

As this Court explained:

> [The] focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. . . . The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequence of a particular decision and whether the decision is uncoerced. Godinez, 509 U.S. at 401, fn. 12, original emphasis.

The Ninth Circuit's refusal to permit consideration of psychiatric and psychological evidence in determining whether Naddi's waiver of his right to counsel was actually knowing and voluntary is in conflict with the better reasoned approach as taken by the Eighth and the Eleventh Circuits. Both Circuits held a defendant's mental health is an appropriate consideration when a court determines whether a waiver of the right to counsel is knowing and voluntary, even when the court has already found the defendant competent to stand trial. Wilkins v.

Bowersox, 145 F.3d 1006 (8th Cir. 1998); United States v. Cash, 47 F.3d 1083 (11th Cir. 1995).

In this case, Naddi, although competent to stand trial, suffered from a mental defect that went to the very issue of whether he knowingly and voluntarily waived counsel: Naddi believed that any attorney appointed to represent him would not serve him well as that attorney was necessarily in collusion with the district attorney prosecuting the case. The Ninth Circuit, citing to Godinez, concluded that it is not possible for a defendant to be mentally competent to stand trial, and still have any mental defect that is relevant to whether a waiver of the right to counsel is knowing and voluntary. Appendix at A-82; see also, Appendix at A-61 - A-62. Accordingly, the Ninth Circuit reversed the State's judgment because the trial court considered evidence of Naddi's mental defect in evaluating whether his waiver of his right to counsel was in fact knowing and voluntary.

As the Eleventh Circuit has recognized, however, an effective waiver of the right to counsel may depend upon factors which include the defendant's mental health. In Cash, the Eleventh Circuit found that, despite a finding of mental competence to stand trial, the defendant's subsequent waiver of his right to counsel was deficient because the lower court's inquiry failed to sufficiently address the effect defendant's personality disorder (which caused him to "overestimate and overstate his abilities") had on: (1) his understanding of the charges and penalties he faced, and (2) his decision to continue to represent himself despite admonitions from the district court that such a course was unwise. Cash, 47 F.3d at 1090.

Similarly, the Eighth Circuit recently affirmed a district court's grant of habeas relief in a capital case. While the state's finding of competency to stand trial was fully supported by the record, its finding that the defendant had made a knowing, intelligent, and voluntary waiver of the right to counsel was not supported by the

record. Specifically, the district court noted that every psychiatrist and psychologist testifying on the issue concluded that the defendant suffered from a mental disorder that prevented him from actually understanding the significance and consequences of his waiver decision. Wilkins v. Bowersox, 933 F.Supp. 1496, 1508, 1513-1515 (W.D. Mo. 1996); affirmed Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1998). As the Eighth Circuit concluded "the mental health of a defendant is also a relevant consideration in assessing whether a waiver of counsel was knowing, intelligent and voluntary" despite the defendant's mental competency to stand trial. Wilkins, 145 F.3d at 1012.

To properly discharge the trial court's duty to determine if a defendant's waiver of counsel is intelligent, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillon, 332 U.S. 708, 723-724 (1948).

> The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The approach of the Ninth Circuit fails to permit due consideration of relevant and admissible evidence in conformity with this Court's holdings in Johnson and Von Moltke.

The different approaches by federal courts in making determinations regarding the knowing and voluntary waiver of the right to counsel as it relates to evidence of a mental defect supports a grant of certiorari in this case. Rule 10, subd. (a)(c), Rules of the Supreme Court of the United States. The clear resolution of this issue is important in order to ensure that trial courts are permitted to consider all relevant and admissible evidence

so as to facilitate true and accurate determinations of the question of whether a criminal defendant's waiver of the right to counsel is in fact knowing and voluntary.

II. The Erroneous Denial of a Defendant's Right to Self-Representation Should Not Compel Retrial in Every Instance

Even assuming an error in denying a request for self-representation, the error should be subject to a harmless error analysis. No persuasive rationale has ever been put forth to explain why a reversible per se rule applies when a criminal defendant is erroneously precluded from self-representation. This Court has not resolved the question of whether an erroneous denial of a defendant's right to self-representation can ever be viewed as harmless error. See, Faretta v. California, 422 U.S. 806 (1975). This Court has assumed that the right is not subject to harmless error analysis in dictum subsequent to Faretta. McKaskle v. Wiggins, 465 U.S. 168, 177, n. 8 (1984); see also, Arizona v. Fulminante, 499 U.S. 279, 310 (1991). The Ninth Circuit has agreed with the dictum in its express statements on the issue. United States v. Arlt, 41 F.3d 516, 524 (9th Cir. 1994). As Naddi's case aptly illustrates, it is incongruous to suggest that representation by competent counsel necessarily prejudices a defendant and compels a retrial.

The anomaly of retrying a criminal defendant because he was prejudiced by being compelled to be defended by competent counsel is particularly evident in Naddi's case. The evidence of Naddi's guilt was overwhelming. Indeed, Naddi had confessed on numerous occasions to killing his wife and four of her family members. The only issue of consequence in the case was whether Naddi was sane at the time he committed the murders. During the protracted state proceedings, which included four competency trials and four sanity trials,

Naddi was represented by 12 different attorneys. Having avoided the death penalty for his crimes, Naddi was hardly prejudiced by the capable representation afforded him during the years of litigation in the state trial court.

The Ninth Circuit also erred in refusing to remand the case in order to permit the state trial court to apply the appropriate legal standard in light of this Court's holding in Godinez in determining whether Naddi's waiver of his right to counsel was knowing and voluntary.[2/] The Ninth Circuit concluded that there was no basis for a remand since there had been a ruling that Naddi was entitled to represent himself earlier in the proceedings. The difficulty with the Ninth Circuit's reliance on that earlier determination is the fact that it did not take into account intervening circumstances in the case. As this Court has held, such a determination must be based on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Johnson, 304 U.S. at 464. Naddi's changing circumstances should not be ignored by relying upon an earlier ruling. That is particularly true where, as here, a defendant's mental competency to stand trial was litigated on four occasions, resulting in his being sent to a state mental institution on one occasion. If the state court applied the incorrect standard, it should be given an opportunity to apply the correct standard before the burdens of a retrial are automatically imposed upon the state.

Moreover, before remanding the matter to the state trial court for a determination under the appropriate standard, a federal court should condition any retrial upon the defendant actually representing himself. In other words, if the state trial court concludes that Naddi was entitled to self-representation under the applicable

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2. When the trial court made its determination, this Court had not yet issued its decision in Godinez.

standard, then Naddi must represent himself in any retrial. If Naddi declines to represent himself, the state court should be permitted to automatically reinstate the judgment of conviction. Otherwise, a criminal defendant is simply being accorded an untenable windfall which squanders limited state judicial and prosecutorial resources. There can be no justification for a criminal defendant being afforded a second bite of the apple with benefit of counsel because he was erroneously denied the right to represent himself.

Accordingly, Petitioner also urges this Court to grant certiorari to determine whether the erroneous denial of the right of self-representation compels a retrial in every instance.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: August 26, 1998.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH DISTRICT, DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,

v.

TOUFIC BADIH NADDI,
Defendant and Appellant.

D013123
(Super. Ct. No. CR76494)

[UNPUBLISHED OPINION]
Filed January 7, 1994

APPEAL from a judgment of the Superior Court of San Diego County, Terry B. O'Rourke and Raymond Edwards, Jr., Judges. Affirmed.

Toufic Badih Naddi appeals a judgment entered after a jury found him sane, guilty of five counts of first degree murder (Pen. Code,[1] § 187) each while using a gun (§ 12022.5) and the special circumstance of multiple murder (§ 190.2, subd. (a)(3)). He received consecutive life sentences without possibility of parole and an aggregate term of 135 years to life.

Naddi contends his double jeopardy rights under both the California Constitution and the United States Constitution were violated when during closing argument the prosecutor committed

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1. All statutory references are to the Penal Code.

deliberate misconduct in order to "save" his case by provoking Naddi and his defense counsel to request a mistrial. He further asserts his double jeopardy rights were violated when at the request of defense counsel, but over his express objection, at a later trial the court granted a mistrial motion based on jurors' exposure to newspaper publicity. Regarding these double jeopardy contentions, he asserts he was denied his right to effective assistance of counsel due to his counsel's failure to raise these two independent double jeopardy claims. Additionally, he argues all guilt and sanity phase verdicts must be reversed because he was denied his right of self-representation under the Sixth Amendment in Faretta v. California (1975) 422 U.S. 806. He continues and argues he was denied both his Fifth and Sixth Amendment rights under the United States Constitution, as well as his corresponding article I, section 15 rights under the California Constitution, to select and present his defense to the jury. He argues the trial court's failure to grant his defense Miranda[2] motion to suppress all statements made by him to Dr. Wait Griswold requires reversal of the "sane" finding, because every psychiatrist testifying for the prosecution relied on Dr. Griswold's inadmissible psychiatric interview. As to sentencing, he challenges the 135 years to life without possibility of parole, asserting it must be vacated due to improper multiple punishment on three separate and distinct grounds. He also argues all gun use enhancement punishment, except for one, must be stricken, pursuant to section 654. As we shall explain, we affirm the judgment.

FACTUAL BACKGROUND

On June 3, 1985, Naddi called the El Cajon Police Department and reported he had shot and killed five people at his home. During that 30 minute telephone conversation, Naddi stated he had a .22-caliber rifle, he wanted the responding police officers to kill him, his two young children were playing outside,

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2. Miranda v. Arizona (1966) 384 U.S. 436.

and his wife had been molested by her father. Naddi was finally convinced to put the rifle down and to come out of the house, at which time he was taken into custody. The police then entered the home and found the five slain victims: Naddi's wife Aida, her father Habib Sabbagh, her mother Lilian Sabbagh, her cousin Michael Sabbagh, and her brother-in-law Osama Maschini. Each had sustained multiple gunshot wounds to the head and Aida and Habib each suffered bullet wounds to the groin. The murder weapon, a Winchester model 190, .22-caliber semi-automatic rifle and unexpended .22-caliber ammunition and casings were found near each of the bodies, as well as on the stairway, kitchen counter and dining room table.

Naddi was promptly advised of and waived his Miranda rights. During police interrogation, Naddi provided some personal background history, characterized his relationship with the victims and his motive for the murders. Specifically, Naddi explained he had been living in the United States for approximately 12 years and had lived in San Diego for the majority of that time. The house had been bought by Habib, as Naddi's in-laws frequently stayed there with he and his wife. He described his relationship with Habib as not very good, emphasizing Habib was on his back all the time and was an old uneducated man with money. His suspicions arose regarding Habib's relationship with Aida because the former often gave the latter money. He became even more suspicious approximately 40 days before the murders, when Aida's sister, Yasirea, had been visiting and went into Habib's bedroom and came out an hour later upset and had to be taken to the hospital. In addition, during the beginning of May, Aida returned from a month-long trip to Jordan where she had gone to care for her ill mother. Naddi had apparently made numerous telephone calls to her, but she was never home. As a result, he became quite angry, believing she was doing things she should not do and was lying to him. In fact, he believed Aida's mother's illness had been merely an excuse, so when she returned he confronted her. At that time, he advised her he believed, when he married her, she had not been a virgin. Promising to forgive her and assuring her

they could start anew, he directed her to sit down and tell him the "whole story" and to write down all the men she had slept with or who were responsible for destroying their marriage. Naddi indicated she drafted a list which included her father, Habib. Later, Naddi confronted Habib regarding molesting Aida and Habib denied it.

The day before the murders, Aida retained a divorce lawyer and had a heated argument with Naddi. That evening, at about 10 p.m., Naddi was surprised by the unannounced arrival of Habib, Lilian, Osama and Michael. At that time, Naddi believed the latter two were Habib's "body guards" and that they all intended to take Aida and the children from him. The following morning, Naddi awoke to discover everyone in the dining room having coffee. He sensed Lilian was ignoring him and he became angry when she kissed his young daughter on the mouth, believing they were trying to instigate him to do something because he had accused them of being "a bad family."

He later left the house and visited a long-time friend, Neil Nicastro. Over a cup of coffee, Naddi told him the "whole story" and Nicastro warned him not to do anything stupid or "drastic." Later, Naddi met another long-time friend, Jack Wells, and asked him how to buy a gun for protection against prowlers. Wells advised Naddi he could buy a shotgun from a department store, but that he could not get a handgun quickly due to the necessary waiting period. Naddi returned home at approximately 11 a.m., at which time the victims were all leaving the house. They returned at approximately 4 p.m. Naddi indicated that after a neighbor left, he went upstairs, made a cup of coffee and sat down at the dining room table. Aida came over to the table and advised him she had an appointment with an attorney on Monday and had paid the attorney a $1,000 retainer which she had placed on Naddi's VISA card. Naddi stated he got the impression Aida was offering him money to leave the house, which infuriated him and caused him to start drinking. Frustrated, Naddi felt he could not "beat the old

man in a court of law" and he knew he had a "slim chance" of obtaining custody of his children.

While Aida was sitting at the table, the remainder of her family were sleeping, and the children were playing outside, Naddi retrieved his rifle from his bedroom and shot Michael first. However, he began calling for Osama whom Naddi had forgotten was downstairs. Naddi then shot and killed Lilian, then Aida and then he went into the bedroom where Habib slept and shot and killed him as well. According to Naddi, none of his victims, except Michael, struggled. Naddi stated he had intended to kill Aida and Habib first. He also declared, believing he had performed his "mission," he tried to shoot himself, but could not do so. He then called the police.[3]

NADDI WAS NOT DENIED HIS RIGHT TO PRESENT A "HEAT OF PASSION" DEFENSE CONSISTENT WITH HIS THEORY OF THE CASE

Naddi claims his federal and state constitutional rights were denied because the defense theory his attorneys selected and presented to the jury as to why the facts supported a "heat of passion" defense reducing his crimes from murder to manslaughter was qualitatively different than the one he wished them to offer. He notes that the Sixth Amendment guarantees him the right to present a defense and the Fifth Amendment guarantees his right to take the stand in his own defense, both rights he claims were violated. He cites the holding in People v. Frierson (1985) 39 Cal.3d 803, 813-814, for the proposition that the deference to counsel's choice of trial strategy on tactics counsel must bow to the defendant's personal choice where there are "fundamental" decisions in a criminal case. However, in Frierson the defendant made it clear he wanted to present a diminished capacity defense at the guilt/special circumstance phase, a defense for which there

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3. His blood alcohol, taken approximately five hours after the murders, was .01 percent by weight.

was some evidence of which counsel was aware. However, to the defendant's surprise his counsel rested without presenting any defense at all and overriding the defendant's desire to take the stand. (Referring to Frierson's initial trial, People v. Frierson (1979) 25 Cal.3d 142.)

Here, Naddi took the stand and testified extensively concerning his entire marital history and his alleged stormy relationship with Habib over the years. He spoke of the Middle-Eastern culture to which he was exposed and which he declared influenced him substantially, and in particular the Arabic principle that wives should be subservient to their husbands and that those who were unfaithful should be stoned to death.

Although Naddi argues his theory of defense was totally different than that presented by his attorneys, that is a gross mischaracterization. At the guilt phase, the attorneys relied upon a "heat of passion" theory in an effort to convince jurors to reduce the admitted homicides from premeditated murder to manslaughter. Naddi claims his attorneys' "heat of passion" defense was keyed to evidence he suddenly erupted violently and irrationally when his in-laws unexpectedly arrived the night before the shooting and began interacting with his children in a manner he considered sexually inappropriate. These observations coupled with Aida's steps towards divorce and her offer to "buy" custody of the children by paying Naddi money, overlay Naddi's long-festering belief Aida was sleeping with other men and had been sexually intimate with her father since age seven, culminated in the violent assassination of four sleeping persons and his unresisting wife.

Naddi now claims his theory was a different version of the "heat of passion" defense, one based on many years of slights and indignities he suffered at the hands of his wife and her relations. That is, he became more depressed and began drinking after learning of Habib's molestation of Aida and Aida's other infidelities. These confirmed his long-held suspicions regarding his lecherous and domineering father-in-law and unfaithful wife. Thus,

Naddi argues his attorneys overruled his wishes to produce witnesses to support his testimony that his feelings were generated by a "heat of passion" generated by the cumulative effect of a series of events over a considerable period of time. (See instruction in People v. Aris (1989) 215 Cal.App.3d 1178, 1202.) In addition, Naddi contends his defense was based upon proving Aida's infidelity and sexual liaison with her father over the years actually occurred, while he claims his attorneys were motivated to attempt to characterize them as delusions because that dovetailed with the evidence they intended to produce in support of his insanity defense.

Naddi also meritlessly claims his attorneys' failure to call certain witnesses he had identified prevented him from presenting circumstantial evidence that would support his theory. He does not identify any witness that would testify favorably, only vaguely alluding to his belief that certain persons might do so. In light of the fact that several of the witnesses he expected to present favorable evidence did not do so when they did testify, his assertion is purely speculative. However, Naddi's testimony made it very clear that he had no evidence that any sexual molestation by Habib had in fact occurred or that Aida had been sexually unfaithful to him, or that any uncalled witness would so testify. He admitted he demanded Aida prepare a list of people with whom she had slept or had ruined their marriage or had destroyed their marriage in some way. The list included Aida's mother, her sister, an Iranian woman who "they" started bringing to the house and various male relatives, doctors and friends. Naddi admitted drinking with one of his victims, Osama, the afternoon and evening before the murders. When asked why he would buy this victim liquor if he believed he was sleeping with his wife, Naddi replied he never saw him sleeping with his wife and therefore he reacted with normal Middle-Eastern hospitality in providing drinks. He admitted that he suspected Osama because Aida had written his name, but he was not sure, and in fact never saw Aida do anything untoward with any of the people on her list. When Naddi and Osama ran out of liquor, Naddi went to the liquor store and

obtained more. Upon returning, he found only Aida still awake, the other victims had retired. After a brief discussion with Aida in which she purportedly offered him money in exchange for custody of the children, he became angry, believing she was insulting him and then he went downstairs to get his rifle which was loaded with 15 shells and obtained extra bullets from a closet. He admitted he went downstairs to get his rifle for the purpose of shooting the sleeping people upstairs. In addition, Nicastro testified to Naddi's disheveled appearance and depressed attitude several hours before the killing and told another person that Naddi stated he wanted to kill his father-in-law, but did not have the guts to do it. After having a conversation with Nicastro, Naddi met Wells at a coffee shop at approximately 9 a.m. Wells described Naddi as being freshly shaven, wearing a suit and tie with no noticeable difference in demeanor or actions than any other day. However, Naddi asked Wells if he knew where he could get a gun which he needed for protection. Wells replied it would probably take two or three weeks to get a permit for a gun, but if he went to Montgomery Ward or Sears & Roebuck he could get a shotgun. Naddi testified he then went to a sporting goods store and to a Montgomery Ward for the purpose of buying a gun; however, he decided he already had a gun in the house that was adequate so he just went home. Upon arriving there he took the gun downstairs and "waited for my children to come back."

The children arrived home at approximately 2 p.m. and a neighbor, Kathy Cradit, came over at approximately 2:30 and stayed a half hour. She found Osama and Naddi sitting at the kitchen table talking, the children playing outside the house, and Aida fixing food. Cradit, Aida and Lilian had a normal conversation and everyone was in good spirits. Cradit testified she had never seen Aida being sexually approached by Habib during the years she knew him and denied ever seeing him act inappropriately toward Naddi's children, Aida or other women.

In an effort to establish Habib had a propensity for sexually inappropriate conduct toward women and children, defense

counsel called Lois Hellberg to testify concerning her observations on the single occasion she and her husband had visited the Naddi home and participated in a barbecue at which Habib was present. Her testimony provided no support for this theory. Defense then called Marian Akroush, a native of Syria, who had a long-standing personal relationship with Naddi and Aida, and came in contact with Habib on several occasions. On one occasion while Habib was visiting in the Akroush residence, he put his arm around Akroush. Following that incident, Akroush's husband refused to permit her to go to the Naddi residence, because in Syrian culture "no man puts his arm around a lady except her husband." Akroush was deeply offended.

On cross-examination, Naddi admitted Aida stated she never had sex with the men (or women) she placed on the list. But, even though he claimed to suspect possible sexual activity between Aida and at least some of the men, he made it clear that the main reason he killed Osama and the others is "that God wanted them to die." ("Them" included Michael who was not even on the list prepared by Aida.) After recounting how he had spoken to a lawyer, telling him he wanted to take the law into his own hands because he could not face the possibility Aida and his in-laws would defeat him during the divorce and custody proceedings, he again stated he did not wait and fight in court, "[b]ecause God wanted [the murders] to be done at that time." By the end of Naddi's testimony he had completely negated any theory that the killing was due to a "heat of passion," whether provoked by cumulative incidents festering over a long period of time or brought on by the unexpected arrival of his in-laws, the divorce, or Aida's insulting him by offering money in exchange for custody of the children immediately before the massacre.

In any event, defense counsel in final argument recounted the long history of Naddi's frustrations with Habib's dominance and interference, and the demeaning position in which Naddi was placed by the wealthier man. He also detailed evidence that Naddi was frustrated through the numerous broken promises of

businesses to be purchased and provided by Habib and his humiliation upon learning of Aida's unfaithfulness and incest.

The court instructed the jurors with the standard manslaughter instructions from CALJIC, advising them that to reduce an intentional felonious homicide from murder to manslaughter on the grounds of sudden quarrel or heat of passion, the provocation must be of such character and degree as naturally would excite and arouse such passion and that Naddi must have acted under the smart of that sudden quarrel or heat of passion. They were also instructed that the heat of passion sufficient to reduce a homicide to manslaughter must be one as naturally aroused in the mind of an ordinary reasonable person in the same circumstances and one which obscured the reason of the accused to such an extent that would cause an ordinarily reasonable person of average disposition to act rationally and without deliberation and reflection and from such passion rather than from judgment. The court correctly advised the jurors that either acts committed without deliberation upon a sudden quarrel or committed under the influence of heat of passion would reduce an intentional killing to manslaughter. Significantly, in light of Naddi's own testimony, the jury was instructed that when the influence of passion has ceased to obscure the mind of the accused and sufficient time has elapsed for angry passion to end and reason to control, its conduct will no longer reduce an intentional killing to manslaughter.

Naddi contends the standard instructions did not adequately advise jurors that heat of passion may be aroused by a series of events over a considerable period of time and that verbal provocation may be sufficient. Absent specific instructions to that effect, Naddi apparently argues jurors would give no legal significance to the fact he acted without deliberation and aforethought in the heat of passion if that mental state was the end product of a series of events occurring over a long period of time. He does not support this proposition by reference to the record in this case. Although Naddi would have been entitled to equivalent pinpoint instructions on request (see People v. Thompkins (1987)

195 Cal.App.3d 244, 256-257, & fn. 6), no such request was made here. Because the instructions given correctly set forth the law regarding intentional killings committed under the influence of heat of passion, Naddi's contention his attorneys provided ineffective assistance of counsel for failing to request the special instructions lacks foundation. Likewise, his claim the trial court erred in failing to provide these pinpoint instructions sua sponte is not supported on this record.

THE DOUBLE JEOPARDY ISSUES

Naddi raises various double jeopardy issues after mistrials were granted in several of his separate sanity trials, citing Burks v. United States (1978) 437 U.S. 1, and a reference to Burks in United States v. Scott (1978) 437 U.S. 82. In Burks, the United States Supreme Court applied double jeopardy principles in barring retrial of an unbifurcated case in which it found the defendant's motion for acquittal at the close of the prosecution case should have been granted because the prosecution evidence was insufficient as a matter of law to permit the matter to go to the jury concurrently with the evidence relating to the guilt phase. (Burks v. United States, supra, 437 U.S. at p. 18.)

In Burks, the court based its holding that the government, having the burden of proof, had failed as a matter of law to carry its burden of overcoming defense evidence of the defendant's legal insanity. Thus, that court declared the double jeopardy clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster

in the first proceeding."[4] (Id. at p. 11, fn. omitted; People v. Belton (1979) 23 Cal.3d 516, 527.)

Naddi does not rely on the precise holding of Burks, impliedly conceding the evidence at the time his request for mistrial was granted following completion of the evidence was sufficient to support a jury finding he had not carried his burden to establish he was legally insane at the time he committed these multiple murders. Instead, he contends his successful request for mistrial before completion of the second sanity trial was compelled when the prosecutor deliberately engaged in misconduct to force a mistrial and prevent Naddi from obtaining a favorable verdict. (See Oregon v. Kennedy (1982) 456 U.S. 667.) Naddi also raises a double jeopardy claim after the court granted a mistrial during a later sanity trial at his attorney's request, but over his own express objection. He argues his personal consent was necessary to permit the court to grant a mistrial where there was no legal necessity to terminate because a nonconsensual mistrial ordered by the court under those circumstances would prevent retrial because of the double jeopardy bar. Finally, he argues his attorneys' failure to enter a plea of once in jeopardy (§ 1016) before each subsequent trial should not be deemed a waiver (see People v. Moore (1983) 140 Cal.App.3d 508, 511; People v. Belcher (1974) 11 Cal.3d 91, 96) because it was due to counsel's constitutionally ineffective representation. (See Strickland v. Washington (1984) 466 U.S. 668; People v. Medina (1980) 107 Cal.App.3d 364, 370.)

After the initial jury was unable to reach a verdict on the sanity issue, the trial proceeded before a different jury. The prosecution introduced essentially the same evidence as in the first

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4. We recognize that the facts and procedures in place during Burks's federal trial are significantly different than Naddi's, in which he has the burden to prove legal insanity. We do not address whether double jeopardy rights inure to mistrials entered at a bifurcated not guilty by reason of insanity phase, but have assumed it does solely for the purpose of addressing the merits.

trial, testimony from three psychiatrists. The defense also introduced evidence of the psychiatrists it presented in the first trial, but in addition introduced lay testimony that following the killings Naddi had confided his actions were in accord with God's command to kill his wife whom he truly believed to have been unfaithful. One of the prosecution's expert witnesses, Dr. Gary Weissberg, listened to testimony of one lay witness, a jail minister who testified to Naddi's references that he responded to God's commands. Dr. Weissberg then testified that had he been aware Naddi had confided in others that God had instructed him to kill his victims because they were evil, he would have had to "reconsider" his opinion that Naddi was not acting delusionally at the time of the killings. Thus, at the close of the evidence, three defense psychiatrists essentially believed Naddi was legally insane at the time of the killings, two psychiatrists concluded he was sane and Dr. Weissberg who, after listening to the lay witness testimony that Naddi professed to have been motivated by a command from God, indicated that "had Mr. Naddi received, or believed that he had received a communication from God instructing him to kill these people because they were evil, I would have to reconsider my opinion." Although Dr. Weissberg's position seems equivocal, it does not, as Naddi attempts to convince us on appeal, make Dr. Weissberg's testimony totally favorable to the defense. Especially in light of Dr. Weissberg's next remarks: "However, this appears to be inconsistent with other evidence that was gathered around the same time." Dr. Weissberg never testified he believed Naddi was not sane at the time of these killings. In fact, Dr. Weissberg stated Naddi specifically denied hearing the voice of God when responding to Dr. Weissberg's specific questioning. In summary, all the doctors agree Naddi knew the nature and quality of his acts, but there was a strong difference of opinion as to whether he suffered from a mental disease which prevented him from differentiating right from wrong at the time of the killings.

During final argument the prosecutor discussed testimony of the psychiatrists. He also discussed the testimony of lay witnesses concerning Naddi's statement to them regarding his animosity

toward Habib and his expressed desire to kill him, and recited details of the multiple killings which he believed to be inconsistent with Naddi's acting delusionally. After approximately 50 minutes of argument, the court recessed for lunch.

Following lunch the prosecutor argued for approximately the same amount of time and then began discussing Naddi's personal value system, based upon his Middle-Eastern culture so that he believed child molestation was a worse crime than murder. The prosecutor argued that Naddi may have been making choices because he believed he was morally justified, but that "people often feel that they are in the right, they are on the side of justice, but it is not sufficient to feel justified to think that something is right. The question is, whether or not the person has a capacity to understand right from wrong." At this point the prosecutor argued Naddi making those decisions was "no different than the people who hung [sic] Colonel Higgins last week -- they thought they were on the side of right." Naddi's attorney immediately objected and moved for a mistrial claiming the prosecutor's remarks unfairly prejudiced and inflamed the jury.

Outside the presence of the jury, the court stated Colonel Higgins's recent execution after being held hostage by Shiite Muslims in Lebanon was currently on the front page of the newspapers and recognized the strong emotional resentment on the part of the American people against that act. Commenting that Naddi was also from Lebanon, the court asked the prosecutor to attempt to justify what the court characterized as "about the cheapest shot I have ever heard from anyone in closing argument." The prosecutor strenuously argued his analogy was based upon a discussion with Dr. Weissberg as an example of people who believe they are justified in committing murder because they are on the side of right, and was an example he selected because it was fresh in everyone's mind. The court declared it was strongly leaning toward granting Naddi's motion for a mistrial because of the extreme inflammatory nature of the Colonel Higgins's reference in light of the fact Naddi was from the Middle-East. The court then

adjourned until the following morning at which time it reconvened without the jury being present to consider Naddi's motion for a mistrial. At the outset of this hearing, Naddi personally stated he joined in the attorney's motion for a mistrial. Again, the prosecutor strenuously argued against granting the motion for mistrial. He disagreed with the court's analysis that his remark was so inflammatory that an admonition to the jurors could not cure potential prejudice. The prosecutor pointed out that evidence showed Naddi had been born and raised in Jordan, not in Lebanon, a Christian who had gone to a Catholic school and church. After a lengthy argument by the prosecutor opposing the defense motion, the court granted the mistrial, finding the evidence in the case closely weighed, and "I just think the weight of the evidence was in Mr. Naddi's favor" and the prosecutor's statement was sufficient to deny Naddi the possibility of a fair trial.

During the initial conference regarding the defense motion, the court stated it was sure the prosecutor did not intend his remarks to have caused a mistrial, stating "I am sure that, you don't want to retry the case anymore than anyone else does . . . misconduct does not require intent. It can come about by negligence as well. I'm not passing judgment on them." He went on to state "I would assume that you did it spontaneously without premeditation."

Naddi argues the above scenario shows he was entitled to raise the bar of double jeopardy following the grant of mistrial even though the mistrial was granted at his request, citing the holding in Oregon v. Kennedy, supra, 456 U.S. 667. He contends the record unequivocally shows the prosecutor's reference to Colonel Higgins's murder by Lebanese terrorists was deliberately intended to force a mistrial. Naddi theorizes the prosecutor believed the evidence overwhelmingly favored a verdict by reason of insanity and the deliberate misconduct was a ploy to force the defense into a position where it would have to ask for a mistrial, giving the People a fresh opportunity to present better evidence at retrial.

In Oregon v. Kennedy, supra, 456 U.S. 667, the court established a very narrow exception to the ordinary rule which permits retrial following a mistrial to which the defendant consents. It concluded that harassing or overreaching prosecutorial misconduct does not bar a retrial, even if it is sufficient to cause a mistrial on the defendant's motion, absent an intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause. (Id. at pp. 675-676, 679.) The Supreme Court rejected an expanded exception relied on by the Oregon Court of Appeal which had held retrial would be barred if the prosecutor's misconduct was intended to provoke a mistrial or is motivated by bad faith or to prejudice the defendant.

The holding in Oregon v. Kennedy, supra, 456 U.S. 667, is clear as it expresses the intent of the United States Supreme Court in construing the double jeopardy clause of the United States Constitution. However, the individual states are not prohibited from adopting a greater degree of protection than that provided against double jeopardy in the Fifth Amendment of the United States Constitution. (See Curry v. Superior Court (1970) 2 Cal.3d 707, 716-717.) Naddi asks us to do so here, and adopt a rule that the California double jeopardy clause is violated whenever during closing argument a mistrial is declared at the request of the defense based on deliberate acts of prosecutorial misconduct such that the failure to make a mistrial motion would have constituted ineffective assistance of counsel.

This court has considered and rejected a similar argument in People v. Valenzuela-Gonzales (1987) 195 Cal.App.3d 728, 737. In that case, the prosecutor violated an express court ruling that he not question a certain witness about the defendant's drug arrests. The court granted a defense motion for mistrial based on the misconduct of the district attorney. At a second trial, Valenzuela-Gonzales was convicted on all counts before a different judge. However, a new trial was granted before sentencing and prior to the third trial, Valenzuela-Gonzales entered a plea of once in jeopardy which was denied after hearing by the judge who granted

the mistrial. On appeal, we held the trial court's finding the prosecutor's conduct was not intended to goad the defendant into moving for a mistrial was supported by substantial evidence, and therefore the double jeopardy principles did not bar a second trial under the holding of Oregon v. Kennedy, supra, 456 U.S. 667. We recognized, however, California's interest in protecting its citizens has led the courts to interpret its constitutional double jeopardy clause more broadly. We reviewed state court decisions from other jurisdictions which found the double jeopardy provisions of their state constitution should not be construed so narrowly as in Oregon v. Kennedy, supra, 456 U.S. 667.

In State v. Kennedy (Ore. 1983) 666 P.2d 1316, the Oregon Supreme Court interpreted that state's double jeopardy clause to bar a retrial "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal." (Id. at p. 1326.) In Pool v. Superior Court (Ariz. 1984) 677 P.2d 261, the Arizona Supreme Court found the Arizona Constitution bars retrial after a mistrial granted on motion of the defendant because of improper conduct or actions by the prosecutor when that conduct amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, pursued for any improper purpose with indifference to a significant resulting danger of mistrial or reversal, which causes prejudice to the defendant incurable short of a mistrial. (Id. at pp. 271-272, fn. omitted.) The Oregon and Arizona Supreme Courts believed the rule of Oregon v. Kennedy, supra, 456 U.S. 667, required the court to determine a prosecutor's intent through a subjective inquiry, the difficulties of which would make it unlikely for a court to arrive at the truth.

In People v. Valenzuela-Gonzales, supra, 195 Cal.App.3d 728, we expressed our disagreement with the reasoning of the Oregon and Arizona decisions, noting the finding of the trial court on the issue of intent is no different than inferring the existence or

nonexistence of intent from objective facts and circumstances which is a familiar process in our criminal justice system. (See Oregon v. Kennedy, supra, 456 U.S. at p. 675.) We concluded there was no independent state reason to apply a different double jeopardy standard on circumstances such as these than that adopted in Oregon v. Kennedy. (People v. Valenzuela-Gonzales, supra, 195 Cal.App.3d at p. 742.) Naddi asks us to reconsider Valenzuela-Gonzales because it is erroneous. We have reconsidered that decision in light of his arguments, and adhere to it. Thus, the dispositive issue is whether the record establishes the prosecutor's prejudicial remark was intended to provoke the defendant into requesting a mistrial.

As we have earlier stated, the trial court did not believe the prosecutor had such an intent. During the prosecutor's argument against granting the defense motion, the court stated it was sure the prosecutor did not want to retry the case any more than anyone else. It is noteworthy the trial court indicated its strong inclination to grant a mistrial immediately after the defense motion, and before recessing to hear argument. Had the prosecutor intended his remark to provoke Naddi into requesting a mistrial to permit the People a better shot in a later proceeding, that goal was virtually assured before the parties left the courtroom. Instead, the record shows the prosecutor strenuously argued against a mistrial for approximately two hours, attempting to justify his motive in applying the analogy, pointing out his remarks were interrupted in mid-sentence when the court sustained Naddi's objection, and that it was his intent to explain the analogy to the jurors in such a way as to eliminate prejudice. He explained the analogy was suggested to him by Dr. Weissberg shortly before his argument began as an example of how sane people intentionally commit illegal and immoral acts under a belief they are justified in doing so because they are on the side of right.

In Oregon v. Kennedy, supra, 456 U.S. at page 679, the trial court made no findings of fact relative to whether the prosecutor intended his conduct to goad the defendant into moving for a

mistrial. It was not requested to do so and the opportunity never arose during any of the multiple lower court proceedings because no plea of former jeopardy was ever entered. It is Naddi's burden on this appeal to establish the prosecutor acted with the requisite intent. He asks us to speculate from the trial court's characterization of the prosecutor's comments as outrageously inflammatory that it was intentionally introduced to prejudice the jury against him. However, to trigger the bar of double jeopardy, it is not enough that the prosecutor intentionally introduce inflammatory remarks for the purpose of gaining an unfair advantage at trial, there must be proof the action was taken with an intent to terminate the existing trial. (Ibid.) Although Naddi asks us to glean an intent to force a mistrial from the trial court's opinion that the conflicting evidence as to his sanity tilted in his favor, that requires a leap of logic not warranted by the record and one which is inconsistent with the prosecutor's lengthy arguments in opposition to the motion and his urging the trial court to admonish the jurors instead.

II

Following the grant of mistrial for prosecutorial misconduct, attempts to impanel a new jury were aborted because the trial court expressed doubts as to Naddi's present sanity. After a competency trial in which Naddi was adjudged competent, a new jury was sworn and the evidence taking began. This time the People announced they intended to present evidence from a psychiatrist not previously presented. Shortly after the trial began it came to the attention of the court that Naddi's picture was on the front page of both the evening Tribune and morning Union with "teaser" headlines referring to his recent marriage. The picture on the front page of the Union was placed next to another "teaser" headline relating to a different person (Dean Carter) stating, "Serial Killer Gets Death Penalty." Both newspapers contained stories referring to interviews with Naddi's new wife whom he married while in prison during these proceedings, in which she expressed her belief he was insane at the time the

killings took place but had recovered, and that he would be released as soon as the insanity trials were completed. The Tribune article also mentioned that Naddi had been subjected to previous sanity trials, one of which had ended with an 11 to 1 vote for a finding of sanity.

When defense counsel moved for a mistrial, the court questioned each juror and the four alternate jurors. The inquiry established that two jurors read a substantial portion of the articles, one received a phone call from his neighbor who recounted the Tribune article to him and had also read the Union "teaser" about Naddi and his new wife. Juror Carol Blaisdell claimed she did not read either article, but had heard juror Mario Valencia discuss the articles with other jurors in the courthouse hall. Juror Valencia, however, claimed he read only two or three lines of one article and denied discussing the matter with anyone although he heard other jurors claim they saw the newspaper but did not read it. The court specifically declared it believed juror Valencia was not truthful and, in fact, had discussed the article with other jurors as juror Blaisdell had reported. The other jurors and alternates either read and heard nothing about these articles or saw the Union headline. After examination by the court and counsel, each juror declared their verdict would not be affected by this publicity.

Initially, the court stated it believed any potential prejudice could be cured by merely replacing the two jurors who admitted reading the articles with alternates. However, the defense attorneys persisted in their request for a mistrial, pointing out that other jurors were equally tainted, including juror Ernest McKay who admitted violating the court's admonition not to let others discuss the case with him when he permitted his neighbor to read the entire Tribune article to him, and juror Valencia who the court had described as "covering up" by giving untruthful testimony concerning his discussion of the articles with other jurors.

Once again, the prosecutor vigorously argued against the grant of a mistrial, stressing his belief that an admonition to the jurors would be sufficient to cure any potential prejudice. Naddi also opposed the motion. At the beginning of the second day of the mistrial hearing, the court stated:

> "Yesterday, Mr. Naddi, your two counsel made a motion for a mistrial. Do you join in your counsels' motion for the mistrial?
>
> "NADDI: No, Your Honor.
>
> "THE COURT: You're against that?
>
> "NADDI: Yes, Sir."

Without further inquiry the court stated: "All right, lets proceed counsel. It's your motion. Speak Mr. Crabtree and Ms. Barrett." No further inquiry was made as to why Naddi was opposed to the motion.

After considerable discussion and argument as to what possible forms the prejudice might take, the court pointed to the several jurors who expressed their surprise, and shock, when learning that someone in Naddi's position could be permitted to marry. The court stated:

> "[The defense attorney] has all sorts of speculations about what effect it have [sic] but you do have people who describe a reaction of shock. Do you think a reaction of shock can be expunged in the minds and souls of jurors by judicial admonition?"

After the prosecutor responded appropriately, the court stated:

> "I think most people think that if somebody gets married, they are planning on a marriage where it is consistent

> with their future state. They may not think that that means Mr. Naddi is walking out the door, but would be a pretty safe inference that Mr. Naddi thinks he is, wouldn't it? Wouldn't that be the most logical inference . . . that would say something about what Mr. Naddi's future plans and state of mind might be? If there is an inference that would be the most commonsensical one, it is Mr. Naddi thinks he is going to be a free man soon, because that's the state most people associate with getting married. Most people don't associate with getting married if you're heading for death row."

After the prosecutor suggested the court was basically dealing in speculation, it stated its belief there were some plausible interpretations that could be prejudicial including:

> "The most likely one that a person who gets married because it is associated with that state people associate with getting married outside the prison bars . . . [and] some of these jurors who were shocked were shocked that a person in his circumstance would even think it was possible."

The court then continued:

> "[W]e don't know, do we? They didn't want to explain why they were shocked. We couldn't get them beyond that attitudinal statement, could we? We tried. They knew they were shocked, but they didn't really articulate why."

After a brief recess, the court granted the defense motion for mistrial, concluding Naddi's concurrence in the defense motion unnecessary, relying on People v. Moore (1983) 140 Cal.App.3d 508, 513. It stated that the prejudice caused by at least seven jurors and two alternates seeing the newspaper headline, which in the Union was placed beside the headline indicating that a serial

killer had received the death penalty, created a prejudice the court believed was incurable by admonition. The court concluded from its personal observation of the jurors, the prejudice was so great it was legally necessary to grant the mistrial.

In Curry v. Superior Court, supra, 2 Cal.3d 707, the Supreme Court declared that absent clear consent of a defendant or counsel, a case mistried before submission to the jury may not be retried except for some cause beyond the control of the court amounting to legal necessity. In Curry, the Supreme Court rejected a claim of legal necessity where the trial court had declared a mistrial sua sponte because certain testimony had been erroneously admitted which the court felt made it impossible for either the People or the defendant to have a fair trial. (Id. at p. 714.) Examples of legal necessity are disappearance of the defendant's attorney in midtrial (People v. Manson (1976) 61 Cal.App.3d 102), defense counsel's discovery of a conflict of interest in midtrial (People v. McNally (1980) 107 Cal.App.3d 387, 393), disqualification of a trial judge during trial (T.P.B. v. Superior Court (1977) 66 Cal.App.3d 881, 886), and a defense counsel's misstating evidence in opening statement which undermines the defendant's credibility (People v. Coleman (1992) 9 Cal.App.4th 493, 496).

In Arizona v. Washington (1978) 434 U.S. 497, the Supreme Court considered the standard by which an appellate tribunal should review a decision of a trial court to grant a mistrial over a defendant's objection, in a case where the trial court had made no findings relative to whether there was a manifest necessity for granting the mistrial. Although the Supreme Court concluded defendants have a constitutional interest in their right to have a trial completed by a particular tribunal (Arizona v. Washington, supra, 434 U.S. at p. 503, citing United States v. Jorn (1971) 400 U.S. 470, 484, Illinois v. Somerville (1973) 410 U.S. 458, 466, & Wade v. Hunter (1949) 336 U.S. 684, 689), it held that interest must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments (Arizona v.

Washington, supra, 434 U.S. at p. 503, citing Wade v. Hunter, supra, 336 U.S. at p. 689).

The Supreme Court rejected an interpretation of "manifest necessity" which would preclude the trial court's exercise of discretion in cases where a mistrial is not absolutely compelled. Rather, it found compelling reasons for allowing the trial court to exercise broad discretion in determining whether a high degree of necessity requires a grant of mistrial to avoid having the case decided by a jury which may be tainted by bias. (Arizona v. Washington, supra, 434 U.S. at p. 516.) In Arizona, the Supreme Court found that in a strict literal sense mistrial was not "necessary" on the facts presented and that some trial judges might have proceeded with the trial after giving appropriate cautionary instructions. However, it felt "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." (Id. at p. 517.) The Supreme Court noted that it had affirmed a trial court that had concluded the publication of a letter in a newspaper during trial made it impossible for the jurors to dispose of the trial fairly, even though it never examined the jurors to determine what influence, if any, the article may have had on them. (See Simmons v. United States (1891) 142 U.S. 148, 155.) Having concluded the trial court's decision to declare a mistrial is entitled to great deference, the Supreme Court held that appellate review is to be limited to determining whether the trial court's discretion was exercised soundly, that is not irrationally or irresponsibly.

Here, the court examined jurors and alternates, and permitted the parties to do likewise. The court heard lengthy arguments both for and against the grant of mistrial and explained the reasons for its decision. The court's perception that the character of the material to which several jurors and alternates were exposed was likely to prevent Naddi from having a fair trial even after judicial admonitions, was concurred in by both defense counsel.

We find the court's determination that the extent of the exposure and the quality of the material to which the jury was exposed created a legal necessity for a mistrial, and was well within its discretion. Accordingly, we need not address the issue of Naddi's failure to consent.

FARETTA ISSUE

I

On April 8, 1987, Judge Tharp granted Naddi's Faretta motion and he continued to represent himself until September 18, 1987, when Judge O'Rourke expressed doubt as to his competency to stand trial and to waive counsel and temporarily suspended the proceedings on October 16. A jury found Naddi competent to stand trial; however, on February 18, 1988, Judge O'Rourke permanently terminated Naddi's Faretta rights and appointed counsel. In doing so, the court declared its decision was based on evidence presented during the competency hearing showing Naddi suffered from paranoia causing him to have delusions concerning his present and past attorneys being corrupted by the district attorney or his murdered wife's family. The court concluded Naddi's decision to waive counsel was influenced by this major mental disorder to the extent that his action could not be fairly characterized as voluntary. Judge O'Rourke then presided over three aborted not guilty by reason of insanity trials during which time Naddi was represented by a succession of attorneys against whom Naddi filed numerous Marsden[5] motions to have them involuntarily relieved. During some of the Marsden motions Judge O'Rourke repeated his opinion Naddi was incompetent to waive counsel.

Preliminarily, we note that Judge O'Rourke's ruling on Naddi's competency to stand trial, that is to understand the factual nature

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5. People v. Marsden (1970) 2 Cal.3d 118.

of the proceedings against him or to assist counsel in the conduct of a defense in a rational manner (§ 1367), is qualitatively different than the mental competency required to make an intelligent decision regarding self-representation. (See discussion in People v. Burnett (1987) 188 Cal.App.3d 1314, 1326-1327, and authorities cited.) Where there is evidence of a defendant's mental illness, a trial court should consider psychiatric evidence when deciding a request for self-representation. (Id. at p. 1329; People v. Salas (1978) 77 Cal.App.3d 600, 605.)

When Judge O'Rourke announced his decision, he cited the standard adopted in Curry v. Superior Court (1977) 75 Cal.App.3d 221, 227. There, the court deferred to the United States Supreme Court decision of Westbrook v. Arizona (1966) 384 U.S. 150, which distinguished between competency to stand trial and the competency to make a knowing and intelligent waiver of the right to counsel. From Curry, Judge O'Rourke noted one commentator's interpretation of Westbrook as holding "a defendant must be free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary," citing Silten & Tullis, Mental Competency in Criminal Proceedings (1977) 28 Hastings L.J. 1053, 1066. Further, the court made its finding immediately following testimony of six doctors to the effect that Naddi suffered from a major mental disease, paranoia. Some doctors concluded Naddi had delusions that his entire array of defense counsel had turned against him because of a conspiracy with the district attorney's office and/or his murdered wife's family. In support of Naddi's position he was incompetent to presently stand trial, his attorney emphasized the conspiracy obsession regarding his attorneys was the product of his mental illness. He also emphasized the doctors unanimously agreed he suffered from a mental illness, and some clearly concluded Naddi totally lacked insight regarding that illness.

Judge O'Rourke applied the proper legal standards in evaluating Naddi's competency to make a choice concerning self-representation and applied it to substantial psychiatric evidence

showing he lacked that competency. Accordingly, we find Naddi was not unconstitutionally deprived of his right to self-representation during the guilt phase of his trial which then ensued.

II

Naddi also argues his Sixth Amendment right to counsel and self-representation required the trial court to continue the guilt trial until such time as he regained his competency to choose self-representation. He cites no authority for this proposition, made no motion for continuance and does not suggest he was at all inclined to agree to waive his constitutional right to a speedy trial. We hold there is no sua sponte duty on the trial court to continue trials of persons mentally competent to stand trial (§ 1368) who are presently mentally incompetent to voluntarily and knowingly waive their rights to an attorney on the mere possibility that sometime in the future they may achieve that enhanced level of competency.

We reject Naddi's argument that a finding he was not competent to make a knowing choice as to whether to exercise his right of self-representation is the functional equivalent of finding him mentally incompetent to conduct his own defense in a rational manner, which would require criminal proceedings to be stayed pursuant to section 1367. As explained in Curry v. Superior Court, supra, 75 Cal.App.3d at page 227, the standard in evaluating one's ability to make a required voluntary and knowing Faretta waiver is not the same as that of section 1368. (See also Westbrook v. Arizona, supra, 384 U.S. 150.) Naddi cites the holding of Godinez v. Moran (1993) 113 S.Ct. 2680, for the proposition that competency to act as one's own attorney is subject to no higher test than competency to stand trial. That is the Godinez holding; however, Naddi attempts to extrapolate it into a holding that the test for determining whether a "waiver" of one's right to counsel is the same. This argument is contrary to express language in Godinez which recognizes there is a heightened standard for

adjudging whether a waiver is knowing and voluntary. (Id. at pp. 2687-2688.) Because Naddi's premise is incorrect, we reject his conclusion that he was convicted while legally incompetent.[6]

III

Naddi contends Judge O'Rourke lacked jurisdiction to "either ignore or review" the earlier Faretta ruling made by Judge Tharp which had granted him the right to represent himself. Although unclear, it appears Naddi's jurisdictional argument assumes Judge O'Rourke countermanded Judge Tharp's earlier Faretta determination and set it aside because he believed it was error. On this erroneous assumption Naddi argues an order made in one department of a superior court cannot be ignored or overlooked by another department because under California Constitution article VI, section 4 jurisdiction is vested in the court and not in a particular judge or department. (Citing In re Kowalski (1971) 21 Cal.App.3d 67, 70.) However, the record shows Judge O'Rourke's determination rested upon his perception of Naddi's present competency from personally observing Naddi's conduct and statements, and considering the psychiatric testimony.

Although we have found no case directly on point, decisional dictum in People v. Clark (1985) 168 Cal.App.3d 91, 95, suggests it is conceivable that a defendant's conduct during criminal proceedings might be so deficient or irrational as to indicate that

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6. Although the question of whether Naddi was mentally competent to waive counsel was not the issue given to the section 1368 jury to determine, the question was asked of various testifying psychiatrists. Dr. Donald Duff believed Naddi's delusions adversely affected his ability to reason and make a judgment as to whether he should represent himself. Dr. E. W. Klatte gave the same opinion. Dr. Richard Rappaport agreed. On the other hand, Drs. William Vargas and Bernard Hansen believed Naddi was capable of making a free choice to waive counsel and represent himself. Dr. Kaushal Sharma also believed Naddi was competent to make a voluntary waiver.

a prior correct Faretta determination should be reconsidered in the interest of justice. In Clark, the court concluded there was no sua sponte duty to reconsider the previous finding of Faretta competency mid-trial merely because of a defendant's eccentric or bizarre behavior. However, it specifically noted that evidence of a defendant's history of psychiatric problems was not brought to the court's attention until after trial (People v. Clark, supra, 168 Cal.App.3d at p. 96), implying the trial court might have been held to a different standard had there been evidence suggesting an impaired mental state. Here, not only was there current psychiatric evidence to explain Naddi's observed delusional and irrational comments relating to attorney conspiracy, there was evidence of Naddi's previous finding of mental incompetency and state hospital commitment. Judge O'Rourke's inquiry was exhaustive and pursued in the interest of justice.

IV

At the completion of the guilt phase and the mistrial of the first sanity phase trial, Naddi again moved to proceed pro per. The court appointed psychiatrists to again examine Naddi and present evidence on the Faretta issue. When the court advised Naddi it intended to appoint Attorney Raymond Murphy to represent him in this proceeding, Naddi requested a different appointment due to the fact Murphy had represented him in earlier proceedings and had expressly declared a belief Naddi was incompetent to represent himself. Murphy did appear at the next hearing and was appointed to represent Naddi. When Naddi again objected that Murphy would take a position opposite to his on the competency issue, the court inquired. Murphy responded that he had not yet seen all the doctors' reports, but the ones that he had seen indicated Naddi was capable of waiving his right to counsel. The court then asked Naddi, "Does that answer your question?" Naddi responded, "Yes, Your Honor." The court admonished Murphy that if he found a reason for not going forward with this representation he should advise the court and the court would find another attorney. When the case was called, the court again

inquired of Murphy as to whether he was going to assert Naddi's right to represent himself to which Murphy responded that most reports indicated Naddi was competent to make the election. Naddi made no further objection and the hearing proceeded. During the examination of the doctors, and the examination of Naddi himself, Murphy vigorously emphasized points of evidence most favorable to Naddi's position. During argument, he emphatically declared the weight of the evidence tilted heavily in favor of Naddi's competence to make a knowing waiver of counsel, as well as to represent himself. Naddi, who had been most assertive in earlier expression of concern with Murphy's ability to provide adequate representation, made no comment evidencing dissatisfaction with Murphy's actual performance. We find it to have been professional and totally directed toward achieving the competency result Naddi preferred, contrary to the vituperative characterization in Naddi's brief. The fact Judge O'Rourke was unpersuaded by Murphy's advocacy and that all but one psychiatrist believed Naddi was mentally competent to make a knowing waiver of counsel does not, on this record, reflect inadequacy of Murphy's representation. The court stated it relied on Dr. Rappaport's clear opinion that Naddi continued to be delusionally incapable of making a rational decision. The court was entitled to give greater credence to Dr. Rappaport's opinion than the other psychiatrists after evaluating the opinions in light of its own extensive observations of Naddi's conduct which, in regards to attorneys, it found corroborative of Dr. Rappaport's conclusion that Naddi's ability to make a knowing and rational Faretta choice was substantially impaired by his delusions.

V

After the third sanity phase trial was mistried, Judge O'Rourke was removed from the case. The matter was referred to the presiding department where Naddi promptly brought a Marsden motion against his present attorneys and advised the court he had refused to cooperate with and talk to his attorneys and would continue to do so in the future. Naddi advised the

court he objected to the fact his attorneys were spending time reading the thousands of pages of transcripts generated during the (1) guilt, (2) competency, and, (3) aborted sanity trials, commenting that he had told them those transcripts contained errors. However, he affirmed that although he had personally identified numerous errors in those transcripts he refused to identify them to his attorneys. When the court denied his motion to substitute attorneys, he asked the court for the right to represent himself. The motion was summarily denied and the matter assigned to Judge Edwards. Naddi then asked Judge Edwards for the right to represent himself during a hearing in which Naddi denied his paranoia regarding his attorneys conspiring to work against his stated interest. "It's obvious now they [attorneys] are cutting away on me so that -- they did the same thing in the past and now its another story that is repeating itself cutting my progress to my pro per status." Naddi faults Judge Edwards's treatment of his oral request of May 31, 1990 as unduly abbreviated; however, only one month before, the court had denied Naddi's written request for self-representation and stated it had no doubt that, based upon the court's observation of Naddi, the psychiatric diagnoses of delusions were correct and he presently lacked the mental capacity to make a knowing and intelligent waiver of counsel. Although Naddi now contends Judge Edwards denied him a Faretta hearing, the record shows that is incorrect. Although it was not a hearing in which psychiatric testimony was again taken, the court's remarks show it considered evidence taken at the previous Faretta hearing and evaluated it in light of its own current observations. It was in light of all these facts the court concluded Naddi continued to be affected by conspiratorial delusions regarding all attorneys to the extent he could not make a rational, intelligent choice between representing himself or having counsel. On this record, there is no showing of an abuse of discretion in the court's finding.

THE MIRANDA ISSUE

Shortly after Naddi was arrested, he waived his Fifth Amendment rights after being properly admonished pursuant to the requirements in Miranda v. Arizona, supra, 384 U.S. 436. During the interrogation Naddi was asked whether he would "like to see someone tonight, a psychiatrist or someone[?]" Presumably the interrogating officer was less solicitous about Naddi's well-being than obtaining a psychiatric evaluation as close to the time of the murders as possible. After Naddi said no, the officer stated, "You don't need to see that?" Naddi replied at first that he might, but did not know and finally that "well, it doesn't hurt." Shortly thereafter, Naddi was introduced to Dr. Griswold, a psychiatrist, and Dr. Dickson, a psychologist, with the representation they would ask him some questions. Naddi responded, "All right" and the officer then proceeded to again Mirandize him. Naddi again waived his Miranda rights and the interrogating officer left the room. Before examining Naddi, Dr. Griswold made it clear that he and Dr. Dickson had been asked to examine him on behalf of the district attorney and that he would report to that office. Further, that the proceeding would not be confidential. Naddi responded, "Okay." The results of this examination were in fact reported to the district attorney's office and were considered by each expert who testified at the various sanity phases after Naddi's motion to suppress for violation of Miranda was denied.

Naddi now claims he was goaded by the interrogating officer into agreeing to speak to Dr. Griswold after he had already unequivocally indicated he did not wish to submit to psychiatric examination or interrogation. Although Naddi replied "No" when initially asked if he would like to see a psychiatrist, the interrogating officer's ensuing comments can hardly be interpreted as designed to overreach Naddi's will or characterized as goading. In context, the above dialogue immediately followed an inquiry from the officer whether Naddi had been seeing a psychiatrist for any problem. Naddi stated he had called the psychiatric hotline to arrange an appointment for his wife concerning their problems

approximately four days earlier, but that he had not been seeing a counselor for himself. It was then he was asked whether he would like to see someone like a psychiatrist that evening and he responded "No." The officer inquired, "You don't need to see that?" Naddi replied, "I might myself, I don't know." When the officer replied "If you want that we can arrange it," Naddi essentially acquiesced.

Naddi's challenge on appeal is specific: That his initial "No" response was an unambiguous indication he wished to avoid further questioning on the subject of psychiatric examinations. He analogizes this colloquy as an indication of his right to remain silent. (Citing Michigan v. Mosley (1975) 423 U.S. 96.) However, Naddi's initial response cannot be fairly construed as an invocation of his Fifth Amendment rights to remain silent. The general interrogation continued after the colloquy concerning the officer's willingness to arrange a meeting with the psychiatrist if Naddi so chose. Further, Naddi was again advised he had the right to remain silent and not speak to Dr. Griswold before that examination occurred, and Dr. Griswold made it very clear that the questions and answers would not be confidential but would be provided to the prosecuting attorney. Since Naddi had just been advised that anything he said could and would be used in court against him, we find no Miranda violation.

SENTENCING

The court imposed a sentence of life without possibility of parole. However, in articulation the court stated:

> "The defendant is to serve an additional two years as to each allegation of P.C. 12022.5 in counts 1, 2, 3, 4, 5 to run consecutively to each count and consecutive to each other, for a total term of 135 years to life. Per P.C. 190.2(a)(3), special circumstance, the term is life without the possibility of parole."

Naddi characterizes this as imposing a consecutive sentence of life without possibility of parole to 5 consecutive sentences of 27 years to life. In fact, Naddi argues that sentencing him to a 25 year to life sentence on one murder while consecutively sentencing him to another 25 year to life sentence for another murder, the latter which served as a basis of the special circumstance, punishes him for one murder twice in violation of section 654. However, the jury verdicts on each of the five counts required a sentence of life without possibility of parole. That sentence was imposed as required by law. Although the People agree the imposition of each of the five life without possibility of parole sentences consecutively could be accurately described as redundant, in any event the actual sentence is life without possibility of parole. Naddi does not argue that consecutive life without possibility of parole sentences are unauthorized. He only argues the determinate sentences also purported to be imposed consecutively to the sentence of life without possibility of parole. However, this misreads the abstract of judgment which merely recites the determinate sentences for each count to which Naddi will be subject should the life without possibility of parole special circumstance sentence be vacated on any count.

Alternatively, Naddi argues imposing both two 27 year to life sentences for two of the murders and then imposing the punishment of life without possibility of parole by using those same two murders constitutes a direct violation of section 654. That is, he argues section 654 precludes punishing one murder separately and then inflicting additional punishment by increasing punishment for a second murder from 25 years to life to life without possibility of parole. In People v. Price (1991) 1 Cal.4th 324, 492, the Supreme Court asserted: "Section 654 does not preclude separate punishment for crimes of violence committed against separate victims." Price is acknowledged by Naddi who, however, attempts to distinguish it. In Price, the court resolved the issue of whether section 654 precluded punishment for one murder simply because it was used as a second special circumstance for a second. The first murder was not a capital offense for which an indeterminate

term of 25 years to life was imposed. For the special circumstance murder, the sentence was death. Naddi argues the facts of Price significantly differ from this case where five life without possibility of parole sentences were imposed and make the Supreme Court's section 654 holding in Price not applicable. However, the Supreme Court did not base its conclusion on the specific facts of that case, but cited its earlier holding in People v. Beamon (1973) 8 Cal.3d 625, 638, footnote 10, for the plain proposition that section 654 does not preclude separate punishment for crimes of violence committed against separate victims. That is clearly the case here, regardless of the type of sentences imposed. Granted, the Supreme Court in Price does go on to state: "Moreover, defendant will be required to serve the sentence for the [first] murder only in the event the death sentence for the [second] murder is set aside." (People v. Price, supra, 1 Cal.4th at p. 492.) However, that comment is merely an aside and is not, as Naddi would urge, the basis for its conclusion regarding the applicability of section 654 to crimes of violence against separate victims.

CULBRETH ISSUE

The court imposed a separate two-year gun use enhancement to each of the five indeterminate terms. Naddi argues that four of these must be set aside under the authority of In re Culbreth (1976) 17 Cal.3d 330.[7] Culbreth holds that only one enhancement may be imposed on multiple counts involving multiple victims of violent crime for any charged offenses which are incident to one objective and effectively comprise an indivisible transaction. In People v. King, supra, 5 Cal.4th 59, the Supreme Court permitted only one enhancement where the defendant robbed a drug store at gunpoint and shot two attendants, noting

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7. Culbreth's holding relevant to this issue was recently overruled in People v. King (1993) 5 Cal.4th 59, 79-81. However, the ruling in King was prospective only and the court ordered it not be applied retroactively to crimes committed prior to the finality of its King decision.

both victims were intended from the outset and there was only a brief time gap between the shootings which occurred at the same location. It distinguished cases such as People v. Pride (1992) 3 Cal.4th 195, 269, which imposed separate enhancements for stabbings occurring at least 30 minutes apart in different areas of an office building, and People v. White (1981) 117 Cal.App.3d 270, 284, where a defendant reloaded his gun and traveled from one side to the other of a city hall to commit separate killings. Further, it approved the resolution hypothetically discussed in People v. Raby (1986) 179 Cal.App.3d 577, to the effect that if a second victim had unexpectedly appeared on the scene causing the defendant to react to the turn of events by shooting, multiple firearm use enhancements would have been permitted. (See People v. King, supra, 5 Cal.4th at p. 81.)

Here, Naddi reloaded his gun on numerous occasions and at one time had to go obtain additional ammunition.

Naddi does not cite any facts of this case which show that he comes within the Culbreth rule. His argument consists only of a bare conclusion that his "single use of a firearm comes within the Culbreth rule." (For that matter, the People's brief is not very helpful.) In any event, Naddi's loading of a firearm, then walking from room to room to shoot four sleeping persons and then walking back downstairs to shoot his wife sitting at a table is hardly akin to the commission of a "single frenetic act of violence" which resulted in multiple victims described in Culbreth. Here, there is not one indivisible transaction, but a separate deliberate seeking out of five separated victims. Although the shootings occurred close in time, we conclude they are not part of one indivisible transaction as contemplated by Culbreth.

DISPOSITION

The judgment is affirmed.

WORK, Acting P.J.

WE CONCUR:

TODD, J.

BENKE, J.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TOUFIC BADIH NADDI,
Petitioner,

v.

D.R. HILL, WARDEN,
Respondent.

Civil No. 95-0022-J(AJB)

REPORT AND RECOMMENDATION
Filed January 23, 1996

Petitioner, a state prisoner, proceeding pro se, has filed an Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (1988). This Court, having reviewed all of the pleadings and relevant exhibits submitted by both parties, hereby recommends as follows: (1) that Petitioner's application for a Writ of Habeas Corpus based upon his claims that his conviction was obtained in violation of double jeopardy when the second and third sanity phase trials were mistried should be DENIED; (2) that Petitioner's application for a Writ of Habeas Corpus based upon his claim that he was denied effective assistance of counsel should be DENIED; and (3) that Petitioner's application for a Writ of Habeas Corpus based upon his claim that he was denied his right to self-representation should be GRANTED, and that the case should be reversed and remanded for a new trial.

BACKGROUND

On September 17, 1990, Petitioner was convicted of five counts of first degree murder with personal use of a firearm. Pursuant to his conviction, he received consecutive life sentences without the possibility of parole and an aggregate term of 135 years to life. Petitioner's Application for a Writ of Habeas Corpus in this Court raises four issues: (1) The Petitioner's conviction was obtained in violation of the protection against double jeopardy when a mistrial was declared during the second sanity phase trial as a result of comments made by the prosecutor during closing arguments; (2) The Petitioner's conviction was obtained by a violation of the protection against double jeopardy when a mistrial was declared during the third sanity phase trial as a result of alleged juror misconduct; (3) The Petitioner was denied effective assistance of counsel when counsel failed to raise double jeopardy arguments following the mistrials of the second and third sanity phase trials; and (4) The Petitioner was denied his right to self representation. Each of these issues were raised in Petitioner's Application to the California Supreme Court for review. Therefore, Petitioner has exhausted his state court remedies and this Court's review is proper.[1]

DISCUSSION OF PETITIONER'S CLAIMS FOR RELIEF

1. Petitioner's Claim that his Double Jeopardy Rights were Violated Upon Mistrial of the Second Sanity Phase Trial.

Petitioner claims that his conviction was obtained in violation of the protection against double jeopardy when, during the closing

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1. The unpublished opinion of the California Court of Appeal sets forth, in great detail, the factual background regarding the five first degree murder charges. (See Respondent's Exhibit 1.) To the extent that a more extensive factual recitation is necessary for consideration of the claims in this Petition. the Court will set out those facts in the discussion of those claims.

arguments of the second sanity phase trial, the prosecutor made prejudicial comments. Because of the prejudicial nature of the comments, counsel for Petitioner moved for mistrial and the motion was granted. Counsel for Petitioner did not, prior to the beginning of the third sanity phase trial, enter a plea of once in jeopardy. Therefore, there was no explicit finding by the trial court whether the prosecutor's comments were made with the intent to goad the defense into requesting a mistrial so as to bar retrial under the principles set forth in Oregon v. Kennedy, 456 U.S. 667 (1982). The California Court of Appeal, however, found that the trial court implicitly rejected the argument that the prosecutor made his comments with an intent to goad the defense into requesting a mistrial. See,Respondent's Exhibit 1, p. 23.

A. Discussion of the Law.

Pursuant to Oregon v. Kennedy, 456 U.S. 667 (1982), where a trial is terminated upon the request of defendant, double jeopardy does not bar retrial absent an intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause. Id. at 676. This test requires the court to examine the objective facts and circumstances surrounding the request for a mistrial, and make a determination or finding of fact as to whether the prosecutor intended, by his or her conduct, to provoke the defendant into requesting a mistrial. Id. at 675. Because the issue of intent regarding the prosecutor's conduct in a claim of double jeopardy under Oregon v. Kennedy is a finding of fact, the finding of the state court is entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and is reviewed for clear error. Greyson v. Kellam, 937 F.2d 1409 (9th Cir. 1990); Weston v. Kernon, 50 F.3d 633, 636 (9th Cir. 1995). In addition, an evidentiary hearing is necessary only where an examination of the record reveals that the state court's finding is not entitled to the presumption of correctness. Greyson, 937 F.2d at 1415.

B. Examination of the Trial Court Record.

On August 8, 1989, following the close of evidence in the second sanity phase trial, the prosecutor began his closing argument. After the prosecutor argued approximately 40 minutes, the court broke for lunch and resumed again at 1:30 p.m. The prosecutor continued his closing argument. Following approximately another hour of argument, the prosecutor made the following statements:

> All the doctors do agree on one thing, though, this is an encapsulated delusion, that Mr. Naddi's delusion is only in one area. They all agree that he was not having hallucinations, not hearing the voice of God, no commands from God. They all agree that he did not feel controlled, did not feel obligated, and as Dr. Strauss said, he did not feel powerless, commanded, victimized, so that he could not resist the will of God or some other force.
>
> The delusion gave him false information, just as Dr. Jaffe said, just as Dr. McTigue said, just as Dr. Weissberg said, but it didn't give him a way out. It left him hanging out on that limb and he had to go and see what to do about it and he had to decide for himself what to do about this bad thing and he made a wrong judgment.
>
> It was his value system, as Dr. McTigue said, not part of a delusional value system, but he felt child molest was the worst crime, it was worse than murder. That was his values, but it was not insane values. Maybe some people believe that, I don't know, but it was a value system that he had built up and he made a decision.
>
> People often feel that they are in the right, they are on the side of justice, but it is not sufficient to feel justified and to think that something is right. The question is, whether or not the person has the capacity to understand

right from wrong. Mr. Naddi was making those decisions. He made that decision on his wife, at the time, that she had morally done something wrong by offering this money. Habib was committing incest, that was morally wrong. He was making those decisions, and then *no different than the people who hung Colonel Higgins last week* --

Mr. Crabtree: Objection, your Honor.

Mr. Boles: -- They thought that they were on the side of right.

The Court: Why don't you approach?

(OUT OF THE PRESENCE OF THE JURY.)

Mr. Cabtree: That is improper argument, your Honor.

The Court: Why?

Miss Barrett: That is the second reference to the Middle East. He earlier referred to Allah after he said God's will. He also said --

The Court: You think it is an attempt to prejudice and inflame the jury against Mr. Naddi?

Mr. Barrett: It certainly is. I would make a motion for mistrial.

Mr. Boles: Your Honor, it is an example of something that has recently happened and well known.

The Court: Mr. Naddi is of Middle Eastern origin, isn't he, he is from Lebanon?

> Mr. Boles: It was an example that was discussed between myself and Doctor Weissberg. He brought it up to me.
>
> The Court: I'll order a recess because I am strongly inclined to grant a mistrial. We will go talk about it.

43 R.T. [8-8-89] 8275-8277 (emphasis added). At this point in time, the court took an afternoon recess, after which counsel argued at length about whether a mistrial was proper. The prosecutor strenuously opposed a mistrial and argued that any perceived prejudice from the comment comparing Petitioner to the people who had killed Colonel Higgins could be cured by a strong admonition by the court to the jury to disregard the comment. The prosecutor argued that the evidence before the jury showed that Petitioner was not a Shiite Muslim, like the persons who had executed Colonel Higgins, but rather was a Marionite Christian. 43 R.T. [8-8-89] 8278, 8281, & 8285. The prosecutor also attempted to clarify to the court that he did not intend to liken Petitioner to terrorists, but rather wished to give an example of people who believe they were justified in what they were doing. Id. at 8278, and 8281. Following a remark by the prosecutor that he did not intend to inflame or prejudice the jury, the court stated as follows: "I'm sure that you don't want to retry the case anymore than anyone else does, Mr. Boles, that is probably so. Misconduct does not require intent. It can come about by negligence as well. I'm not passing judgment." Id. at 8287. The court went on to explain, "I would assume that you did it spontaneously, without premeditation, but that has nothing to do with the prejudicial effect or whether it can be cured, it is not my role to try to ferret those things out." Id.

Shortly thereafter, the court recessed for the afternoon, instructing counsel that any further argument regarding the defense motion for a mistrial would be heard the following morning. The court also gave a tentative ruling that it was inclined to grant the Motion for Mistrial. When court resumed again in the morning,

the prosecutor continued to argue strenuously against a declaration of mistrial. Despite the prosecutor's arguments, however, the court granted the defense motion for a mistrial and stated as follows:

> The defense motion for a mistrial is granted. The court does not find Mr. Boles' explanation of his statement or his interpretation satisfactory. I think in conjunction with this is an irresponsible attribution to Dr. McTigue that Mr. Naddi made reference to the will of Allah as quoting her when she said no such thing in connection with the blatant reference to Colonel Higgins. That was an unjustifiable and outrageous appeal to ethnic and racial prejudice.
>
> Mr. Boles was well advised at the beginning of the trial and concurred that it was necessary to keep this trial free from any possible taint of prejudice against the defendant because of his origins in the Mideast.
>
> Questions were placed in the questionnaire. It was prepared jointly by the prosecution and the defense to elicit from our prospective jurors their attitudes about persons from the Mideast. It was the practice of both the defense and the prosecution in the course of the jury selection to immediately stipulate to the removal from our panel of any prospective juror who harbored any hint of prejudice against people from the Mideast.
>
> I believe that the evidence in this case is so closely weighed where it is well within the range of the evidence that this jury could have returned a verdict of not guilty by reason of insanity because of the overwhelming number now of expert witnesses who are of the opinion that Mr. Naddi is legally insane.
>
> I just think the weight of the evidence was in Mr. Naddi's favor and under the circumstances of this case as it

> stands with the testimony before the jury, I believe that the statements made by Mr. Boles are more than sufficient to deny Mr. Naddi the possibility of a fair trial and to tip the scales against him.

43 R.T. [8-8-89] 8309-8311. Thereafter, the court discharged the jury and set a time to resume jury selection for the new trial.

Because Petitioner's trial counsel did not enter a plea of once in jeopardy, there was no subsequent hearing by the trial court to specifically determine the question of whether the prosecutor's comments were made with the intent to goad defense counsel into requesting a mistrial. Upon appeal, the California Court of Appeal examined the trial court's record and found that the trial court implicitly rejected a finding that the prosecutor had the requisite intent under Oregon v. Kennedy. Respondent's Exhibit 1, p. 23. In so finding, the California Court of Appeal focused upon several factors including: (1) The trial court's statements that it was sure the prosecutor did not want to retry the case; (2) The trial court's statement that misconduct does not require intent; (3) The trial court was inclined to immediately grant a mistrial following the defense motion, but the prosecutor continued to strenuously oppose the motion for mistrial; (4) The prosecutor attempted, at length, to explain the purpose of his comments; and, (5) The prosecutor urged the court to continue the trial and admonish the jury strongly to disregard his comments. In the aggregate, the court of appeal found an implicit rejection by the trial court of any intent by the prosecutor to goad a mistrial.

Upon review of the record of the trial court, the Court acknowledges Petitioner's argument that the trial judge made many comments condemning the prosecutor's remarks. The trial court expressed its belief that the prosecutor's comments were extremely inflammatory and prejudicial, and an appeal to racial prejudice. Despite such comments, reviewing the record as a whole, this Court cannot say that the court of appeal's finding of lack of intent on the part of the prosecutor sufficient to bar retrial under Oregon

v. Kennedy, is unsupported by the record. Therefore, this Court recommends that Petitioner's application for a Writ of Habeas Corpus upon his claim that his conviction was obtained in violation of double jeopardy should be DENIED.[2]

2. Petitioner's Claim that his Double Jeopardy Rights were Violated Upon Mistrial of the Third Sanity Phase Trial.

Petitioner claims that his conviction was obtained in violation of the protection against double jeopardy when, during the third sanity phase trial, the court granted defense counsel's motion for a mistrial based upon a finding of prejudice arising out of juror misconduct. After being advised that jurors had been exposed to publicity regarding Petitioner, defense counsel requested that the trial court declare a mistrial. Petitioner did not join his counsel in this request, but rather specifically opposed a declaration of mistrial. After examining the jurors regarding their exposure to the publicity, and the effects of that publicity on their ability to serve as jurors in the case, the trial court found that there was prejudice to the defendant, arising out of juror misconduct. Based upon that finding of prejudice, and upon the further finding that such prejudice could not be cured by an admonition to the jury, the trial court determined that a mistrial should be declared due to legal necessity.

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2. Respondent also argues that petitioner waived his right to raise double jeopardy by failure to enter a plea of once in jeopardy under Cal. Penal Code, § 1016, and that even if double jeopardy was violated, any violation during the sanity phase would not implicate the jury's finding of guilt during the earlier phase of the trial. First, it is clear that if petitioner had a valid double jeopardy claim under Oregon v. Kennedy, which trial counsel failed to raise, trial counsel's failure to raise a claim of once in jeopardy would amount to ineffective assistance of counsel, and cause to excuse any procedural default. Murray v. Carrier, 477 U.S. 478-488 (1986). Further, because this Court finds that double jeopardy is not implicated, it need not reach the question of the effect of double jeopardy in a sanity phase trial on the guilt phase verdict.

A. Discussion of the Law

Double jeopardy does not bar retrial, following the declaration of a mistrial, if the defendant consents to the mistrial or if the mistrial is declared as a result of "manifest necessity." United States v. Tateo, 377 U.S. 463, 467 (1964); Arizona v. Washington, 434 U.S. 497, 505 (1978). The trial court in this case found that Petitioner was not required to personally consent to a motion for mistrial and that such a motion is within the realm of decisions to be made by defense counsel pursuant to People v. Moore, 140 Cal. App. 3d 508, 513 (1983). A review of federal authorities shows, however, that the right to consent to the declaration of a mistrial and forego having the trial completed by the first jury emaneled to hear defendant's case is a personal right of a defendant, which cannot be waived by defense counsel. See Weston v. Kernan, 50 F.3d 633, 638 (9th Cir. 1995)("The mistrial declaration without Weston's clear acquiescence, deprived Weston of an opportunity to decide whether he wanted to allow the first jury empaneled [sic] decide his fate."); United States v. Rich, 589 F.2d 1025, 1032 (5th Cir. 1978)(defendant's attorney was not empowered or authorized, expressly or impliedly, to waive defendant's right to finish trial by the empaneled jury). Therefore, as Petitioner did not personally consent to the declaration of mistrial, the trial court's declaration of a mistrial may stand only if it was required by "manifest necessity".

The Ninth Circuit Court of Appeals has set forth standards to be used by federal courts in determining whether the trial court properly exercised its discretion in declaring a mistrial without the consent or over the objection of a defendant. United States v. Bates, 917 F.2d 388, 394 (9th Cir. 1990). In such a circumstance, the trial court may declare a mistrial if "an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." Id. at 395. The clearest case is where a reversal on appeal is imminent -- the "ends of justice" would not be served in requiring the trial to continue to verdict. Where it is not clear

that the verdict would be reversed on appeal due to error, the appellate court, in reviewing the trial court's decision to declare a mistrial, should consider the following factors: (1) whether the trial court heard the opinions of the parties about the propriety of a declaration of mistrial; (2) whether the trial court considered alternatives to a mistrial and has taken the course of action least harmful to the defendant's rights; (3) whether the trial court acted deliberately; and (4) whether the trial court made a determination of the benefits to defendant of the declaration of a mistrial. Id. at 395-96.

The factual findings of the trial court which underlie the finding of "manifest necessity" are entitled to a presumption of correctness under 28 U.S.C. § 2254. Weston v. Kernan, 50 F.3d 633, 636 (9th Cir. 1995). However, the trial court's finding of the existence of "manifest necessity," sufficient to justify declaration of a mistrial without defendant's consent and even over defendant's objection, is an issue of law to be reviewed *de novo* upon federal habeas review. Id. The trial court's determination to declare a mistrial due to the existence of "manifest necessity" arising out of juror bias is to be afforded the highest level of judicial deference upon appellate review. Arizona v. Washington, 434 U.S. at 510; Weston, 50 F.3d at 638. This level of deference is appropriate because the trial court

> [H]as seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Arizona v. Washington, 434 U.S. at 513-14.

B. Examination of the Trial Court Record

On January 23, 1990, a jury was sworn to try the third sanity phase trial. Following two days of evidence in this third sanity phase trial, on January 31, 1990, the trial judge and counsel were alerted to the fact that several newspapers had run articles the evening of January 30, 1990 and the morning of January 31, 1990, regarding the Petitioner. Specifically, the *San Diego Union* ran three "teaser" boxes, above the title of the newspaper, one of which contained a picture of Petitioner along with the title "Prison Bars Can't Stop Bonds of Love. Carol Moore Is All Too Aware Of Obstacles and Why After Marriage To Man Who Killed Five." The newspaper article, itself, concerned Petitioner's marriage. It also contained information that Petitioner's new mother-in-law disapproved of the marriage, that Petitioner's new wife had no doubt in her mind but that Petitioner had been insane at the time of the killings, that Petitioner had been tried three times previously, and that Petitioner had previously been in a mental hospital in San Bernadino. 48 R.T. [2-1-90] 12819-12820. To the right of the "teaser" box regarding Petitioner's marriage was another "teaser" box which stated "Serial Killer Gets Death Sentence", which referred readers to a story on another page about a man sentenced to death for killing three people. 48 R.T. [2-1-90] 12822.

Upon learning of the publicity, defense counsel moved for a mistrial almost immediately. 47 R.T. [1-31-90] 12727. In light of the defense request for a mistrial, on January 31, 1990, the trial court individually polled each of the jurors and alternates to determine their exposure to the publicity and the effects of such exposure. 47 R.T. [1-31-90] 12731-12764. The survey of the jurors revealed that four of the jurors read all or part of the article in the *San Diego Union*. 48 R.T. [2-1-90] 12813. One of the jurors who read part of the article was also very evasive when questioned by the court about the extent of his exposure to the publicity, and did not admit, in response to a direct question, that he had spoken with another juror about the article. 48 R.T. [2-1-90] 12814.

Another of the jurors who read the article admitted to reading the article only after first stating he had only been told about the publicity by his neighbor, which lead the court to find that juror's explanations were untrustworthy. 47 R.T. [1-31-90] 12774-75. Other than the four jurors who had read all or part of the article in the *Union*, three other jurors and one alternate said that they had read the headlines of the paper regarding Petitioner. 48 R.T. [2-1-90] 12814.

Following its survey of the jurors on January 31, 1990, the court entertained extensive argument from both counsel regarding whether the publicity was prejudicial, the extent of such prejudice to each party, and whether any prejudice resulting from the publicity could be cured by the court by dismissing certain jurors and admonishing the remaining jurors. The court adjourned on January 31, 1990, and allowed counsel until the next morning to present additional arguments and authorities regarding the appropriate action. 47 R.T. [1-31-90] 12808-12810. The following morning, the court heard additional argument from counsel regarding possible prejudice from the publicity and the existence of alternative cures to the prejudice short of a mistrial. The court also inquired of Petitioner as to whether he joined his counsel's request for a mistrial, and learned that Petitioner opposed such a motion. 48 R.T. [2-1-90] 12812.

In the end the court found that Petitioner need not personally consent to a mistrial, but that a request for mistrial is a decision to be decided by defense counsel. The court then granted defense counsel's motion for mistrial. In doing so, the court stated as follows:

> I believe that the prejudice caused by our seven jurors and two alternates seeing the newspaper headline at a minimum, both as to Mr. Naddi in conjunction with the headline about Carter creates prejudice that I don't believe can be cured by an admonition which I think could influence the jury and their decision in this case,

and I think the prejudice is so great that the court believes it amounts to legal necessity.

I have no confidence that the impression could be eradicated.

48 R.T. [2-1-90] 12838.

Upon review of the record, this Court finds that the trial court's factual findings that actual prejudice existed, and that such prejudice could not be remedied short of a declaration of mistrial, are well supported by the record.[3] In addition, upon *de novo* review of the record, this Court finds that there was manifest necessity requiring the granting of a mistrial and that the trial court considered all of the factors as set forth in United States v. Bates, 917 F.2d 388, 394 (9th Cir. 1990). The trial court explicitly rejected the proposition of defense counsel that prejudice was to be presumed where there was juror exposure to publicity during trial, 48 R.T. [2-1-90] 12823, and found that there was actual prejudice to the defendant due to the jurors' exposure to the publicity. 48 R.T. [2-1-90] 12838. The trial court also allowed both counsel to argue, at great length, about the propriety of declaring a mistrial. The trial court considered alternatives to a mistrial, including removing the two jurors who had read the entire article from the jury and admonishing the remaining jurors to disregard any information they had learned from the publicity. 48 R.T. [2-1-90] 12816. In the end, the trial court was particularly concerned about the prejudicial effect the news of Petitioner's remarriage would have upon jurors, who expressed shock upon learning that someone in his position, i.e. on trial in a death penalty case, would remarry. 48 R.T. [2-1-90] 12834. Because of all of these

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3. Petitioner also argues that the presumption of correctness does not apply to the trial court's finding of prejudice because the trial court erroneously applied a "presumption of prejudice" standard regarding the exposure of jurors to publicity. However, the trial court explicitly recognized that such a presumption did not apply. 48 R.T. [2-1-90] 12823.

considerations, after a great deal of deliberation and argument, the trial court concluded that a declaration of mistrial was necessary.

This Court finds, upon *de novo* review of the record, that there was manifest necessity requiring the trial court to grant a mistrial, even over Petitioner's objection. Therefore, the Court finds that Petitioner's claim of double jeopardy based upon the declaration of mistrial during the third sanity phase trial is without merit, and recomends that Petitioner's application for a Writ of Habeas Corpus based upon this claim should be DENIED.

3. Petitioner's Claim that He Received Ineffective Assistance of Counsel

Petitioner asserts that he was denied effective assistance of counsel when his trial counsel failed to raise claims of double jeopardy following the declaration of mistrials in the second and third sanity phase trials.

A. Discussion of the Law

United States Supreme Court decisions have emphasized that the Sixth Amendment right to counsel exists "'in order to protect the fundamental right to a fair trial.'" Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842 (1993) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)). Thus, the right to the effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial. Id. In Strickland v. Washington, the Supreme Court enunciated the standards for judging ineffective assistance of counsel claims. First, a petitioner must show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Id. at 688. To this end, the petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. Id. at 690. The court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of

professional competent assistance. Id. Second, the petitioner must affirmatively prove prejudice. Id. at 693. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.; see also Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995), cert. denied, 1995 WL 642028 (Jan. 8, 1996); United States v. Schaflander, 743 F.2d 714, 717-18 (9th Cir. 1984) (per curiam), cert. denied, 470 U.S. 1058 (1985).

B. Examination of the Trial Court Record

Petitioner's claims that his trial counsel was ineffective due to the failure to raise double jeopardy arguments following mistrials of the ssecond and third sanity phase trials is not supported by the record. As discussed above in section 1, Petitioner's double jeopardy claim related to the mistrial of the second sanity phase trial is without merit because there was no intent by the prosecutor to goad a mistrial, sufficient to bar retrial of Petitioner under Oregon v. Kennedy, 456 U.S. 667 (1982). It cannot be said that trial counsel was ineffective for failing to raise a double jeopardy argument or enter a plea of once in jeopardy, as such arguments are without merit.

As discussed above in section 2, Petitioner's double jeopardy claim related to the mistrial of the third sanity phase trial is likewise without merit because such mistrial was correctly declared, even over the objection of Petitioner, due to legal necessity. Even if trial counsel erroneously concluded that Petitioner's personal consent to the mistrial was unnecessary, such error cannot be said to have been prejudicial because the trial court was justified in declaring a mistrial due to legal necessity, even over Petitioner's objection.

Petitioner cannot show any error of counsel in failing to raise claims of double jeopardy following mistrial of the second and

third sanity phase trials, and, as such, Petitioner was not deprived of effective assistance of counsel. Therefore, the Court hereby recommends that Petitioner's application for a Writ of Habeas Corpus upon his claim of ineffective assistance of counsel should be DENIED.

4. Petitioner's Claim that He Was Denied His Right to Self-Representation

Petitioner claims that his conviction was obtained in violation of his right to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975). Petitioner's request to represent himself was originally granted by Judge Tharp on April 8, 1987. 11 R.T. [4-8-87] 50. However, the case was subsequently reassigned for trial to Judge O'Rourke. During a hearing before Judge O'Rourke on September 18, 1987, prior to the commencement of the guilt phase of the trial, Judge O'Rourke expressed a doubt as to Petitioner's competence both to stand trial and to waive his right to counsel. 13 R.T. [9-18-87] 40-41. Thereafter, a competency hearing was convened pursuant to Cal. Penal Code § 1368, and the jury found Petitioner competent to stand trial. 20 R.T. [2-11-88] 964. However, based upon the psychiatric evidence presented at the 1368 hearing, as well as certain other evidence which was presented outside of the presence of the jury because the court believed it related only to the Faretta issue, Judge O'Rourke found, based upon Curry v. Superior Court, 75 Cal. App. 3d 221 (1977), that Petitioner suffered the influences of a mental illness which made it impossible for him to knowingly or voluntarily waive his right to counsel and choose to represent himself. 21 R.T. [2-18-88] 969. Petitioner's Faretta rights were suspended at that time, and despite repeated requests throughout the remainder of the case, Petitioner was not subsequently permitted to represent himself.

A. Discussion of the Law

A criminal defendant undoubtedly has a right to represent himself. Faretta v. California, 422 U.S. 806 (1974). However, the decision to represent oneself must be made "knowingly and intelligently." Id. at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In addition, it is clear that a criminal defendant may not be made to stand trial unless he is competent. Pate v. Robinson, 383 U.S. 375, 378 (1966). He must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960)(internal quotation marks omitted).

In Westbrook v. Arizona, 384 U.S. 150 (1966), the Supreme Court issued a two paragraph order reversing and remanding a criminal conviction because it found that "although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." Id. at 150. Based in part upon Westbrook, several federal courts of appeals and state courts of last resort had held that the standard for finding a criminal defendant "competent" to waive counsel, was higher than the competency standard for standing trial. See Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992); United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987); Blackmon v. Armontrout, 875 F.2d 164, 166 (8th Cir. 1989); United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989); Pickens v. State, 292 N.W.2d 601, 610-11 (Wis. 1980).

However, in Godinez v. Moran, the Supreme Court clarified that the competency standard for waiving the right to counsel is identical to the competency standard to stand trial. ___ U.S. ___, 113 S. Ct. 2680, 2686-87 (1993). In Moran, the trial court allowed the petitioner in a death penalty case to discharge his attorneys

and change his pleas to three counts of first-degree murder to guilty. Two and a half months prior to the discharge of counsel and guilty plea, petitioner had been examined by psychiatrists who found that he was competent to stand trial. Based thereon, the trial court found that petitioner was competent and that he knew the nature and quality of his acts. In addition, the trial court found that petitioner understood the nature of the charges against him, was able to assist in his defense against those charges, understood the consequences of entering the guilty plea, and could knowingly and intelligently waive his right to counsel. Id. at 2683.

Upon federal habeas review, the district court denied the petition for a writ of habeas corpus. However, the Ninth Circuit Court of Appeals reversed the denial of the habeas petition, finding that the trial court "erroneously applied the standard for evaluating competency to stand trial [to the question of whether petitioner was competent to waive counsel], instead of the correct 'reasoned choice' standard," and that the record did not show petitioner was "mentally capable of the reasoned choice required for a valid waiver of constitutional rights." Moran v. Godinez, 972 F.2d 263, 266-67 (9th Cir. 1992).

Upon certiorari the Supreme Court reversed, holding that the "competency" standard is the same for waiving counsel as for standing trial, and that there is no "heightened" standard of competency for waiving the right to counsel. 113 S. Ct. at 2687; see also United States v. Arlt, 41 F.3d 516, 518 (9th Cir. 1994)("If Arlt was competent to stand trial, he was competent to choose to proceed pro se."). In addition, the Court held that the use of the phrase "competent to waive counsel" as used in Westbrook v. Arizona, was merely "a shorthand for the 'intelligent and competent waiver' requirement of Johnson v. Zerbst." Moran, 113 S. Ct. at 2688. "Thus, Westbrook stands only for the unremarkable proposition that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted." Id.

Therefore, there is no distinction between the level of mental capacity or competence necessary under the requirements of Due Process pursuant to Dusky v. United States, 362 U.S. 402 (1960) in order for a criminal defendant to be able to stand trial, and the mental capacity or competence necessary under Faretta for a criminal defendant to be able to waive his right to be represented by counsel. All that is required for a criminal defendant to waive his right to counsel is that the person be mentally competent to stand trial, and that the person make a knowing and voluntary waiver of the right to be represented by counsel. "In this sense there *is* a 'heightened' standard for . . . waiving the right to counsel, but it is not a heightened standard of *competence*." Moran, 113 S. Ct. at 2687 (emphasis in original).

The Ninth Circuit Court of Appeals has not provided a specific formula to be used in determining whether a criminal defendant's decision to waive the right to counsel is knowing and intelligent. United States v. Arlt, 41 F.3d 516, 520 (9th Cir. 1994). However, some guidance is provided in United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994):

> In particular, we require proof that the defendant understood his or her constitutional right to have a lawyer perform certain core functions, and that he or she appreciated the possible consequences of mishandling these core functions and the lawyer's superior ability to handle them.

(Internal quotations omitted). As distinguished from the inquiry as to a defendant's mental capacity, which focuses on a defendant's *ability* to understand the proceedings, the inquiry as to whether a defendant is "knowingly and voluntarily" waiving his right to counsel requires that a defendant be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'." Faretta, 422 U.S. at 835 (quoting Adams v.

United States, 317 U.S. 269, 279 (1942)); see Moran, 113 S. Ct. at 2689, fn. 12 (distinguishing between the two inquiries).

The trial court in the present case found that Petitioner's mental illness rendered him incapable of making a knowing and voluntary waiver of his right to counsel based upon the authority of Curry v. Superior Court, 75 Cal. App. 3d 221 (1977). In Curry the court cited Westbrook v. Arizona, 384 U.S. 150 (1966), as discussed above, for the proposition that there is a distinction between competency to stand trial and competency to make a knowing and intelligent waiver.

> Commentators have interpreted *Westbrook* to mean that while a defendant may be competent to stand trial, he may not be competent to waive counsel . . . . From this they derive the formula that "a defendant must be free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary". . . . Thus, a Johnson v. Zerbst (1938) 304 U.S. 458 standard of an "intentional relinquishment or abandonment of a known right or privilege" is met if the trial court makes the factual determination that the defendant is free of such a mental disorder and indicates, on the record, that he is aware of the consequences of his request.

Curry, 75 Cal. App. 3d at 227 (citations omitted). The court in Curry clearly relied upon a perceived distinction in Westbrook between the competency to stand trial and a heightened competency to waive counsel, which distinction was rejected by the Supreme Court in Moran. Even California courts have now recognized that cases, such as Curry, which rely upon a "free of mental disorder" standard for determining whether a defendant may waive his right to counsel are *per se* inconsistent with Moran. See People v. Hightower, 96 Daily Journal D.A.R. 392, 395 (Jan. 10, 1996) ("Because the trial court properly found appellant competent to stand trial, it necessarily follows that the trial court

erred in denying appellant's motion for self-representation. The two rulings are simply antithetical.").

Respondent's answer to the Petition in this case makes no attempt to distinguish, explain or otherwise address the impact of the Supreme Court's decision in Moran upon this case. Instead, Respondent continues to cite Westbrook v. Arizona, and Curry v. Superior Court and other California appellate court decisions which pre-date Moran. In addition, a review of the written decision of the California Court of Appeal, dated January 7, 1994, shows that Moran was not addressed in that court. Therefore, this Court must analyze the trial court's finding that Petitioner herein did not make a knowing and voluntary waiver of his right to counsel. Whether a waiver of constitutional rights is knowing and voluntary is a mixed question of fact and law which is to be reviewed *de novo*. Moran v. Godinez, 40 F.3d 1567, 1575 (9th Cir. 1994).

B. Examination of the Trial Court Record

Having expressed a doubt about Petitioner's competency both to stand trial and to waive his right to counsel, Judge O'Rourke suspended both the proceedings and Petitioner's right to represent himself. 13 R.T. [9-18-87] 40-41. On January 26, 1988, a competency proceeding, pursuant to Cal. Penal Code § 1368, commenced to determine whether Petitioner was competent to stand trial. 15 R.T. [1-26-88] 156. During this hearing, the Court heard testimony, both in the presence of the jury and outside the presence of the jury, from 6 psychiatrists: Dr. Donald Duff, Dr. Ernest Klatte, Dr. William Vargas, Dr. Bernard Hanson, Dr. Richard Rappaport, and Dr. Kaushal Sharma.

In the presence of the jury, the psychiatrists testified regarding whether Petitioner was competent to stand trial. The jury was instructed that Petitioner

> is deemed mentally competent to be tried for the crime charged against him, one, if he is capable of understanding the nature or purpose of the proceedings against him and, two, if he comprehends his own status and condition in reference to such proceedings and, three, if he's able to assist his attorney in conducting his defense in a rational manner.

20 R.T. [2-11-88] 899. Based upon the testimony of the psychiatrists, the jury found that Petitioner was competent to stand trial. 20 R.T. [2-11-88] 964.

Outside the presence of the jury, Judge O'Rourke heard testimony from the psychiatrists bearing on the issue of Petitioner's "competency" to waive his right to counsel. Judge O'Rourke asked each of the psychiatrists to render their opinion of whether Petitioner was competent to waive his right to counsel based upon the standard as set forth in Curry v. Superior Court, 75 Cal. App. 3d 221 (1977). Specifically, Judge O'Rourke advised the testifying psychiatrists that the appropriate standard was that "a defendant must be free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary." 18 R.T. [2-8-88] 532. Judge O'Rourke wanted the psychiatrists to opine as to whether the Petitioner's choice to represent himself "is made rationally rather than made as a result of a mental illness." 17 R.T. [2-4-88] 433.

Based upon the standard of "competency" to waive counsel set forth by Judge O'Rourke, Dr. Duff opined that Petitioner's decision to represent himself was based in substantial part upon Petitioner's paranoid delusions that the District Attorney and all of the attorneys representing Petitioner had been bought off by his former wife's family. 17 R.T. [2-4-88] 435-36. Dr. Klatte also opined that Petitioner was incompetent to make a decision to waive his right to counsel because of his paranoid delusions. 17 R.T. [2-4-88] 442-44. Dr. Rappaport testified that Petitioner suffered from a paranoid condition, and that Petitioner's delusions

played a one hundred percent role in his decision to waive his right to counsel. 18 R.T. [2-8-88] 597.

Dr. Vargas testified that although Petitioner suffered from delusional jealousy regarding his former wife, he believed that paranoia did not affect Petitioner's competency to waive his right to counsel. 18 R.T. [2-8-88] 534. Dr. Vargas believed that Petitioner's distrust and suspicions concerning his attorneys was based, at least fifty percent, upon his culture. 18 R.T. [2-8-88] 535, 537. Dr. Hansen agreed in all respects with Dr. Vargas' testimony regarding Petitioner's competency to waive counsel. 18 RT. [2-8-88] 539. Dr. Sharma testified that Petitioner's ideas about his attorneys were misperceptions rather than delusionally-based ideas, and that Petitioner could voluntarily and knowingly waive his right to counsel despite these misperceptions. 19 R.T. [2-9-88] 855-58.

Aside from the psychiatric testimony regarding whether Petitioner had a mental illness which influenced his decision to waive his right to counsel, Judge O'Rourke undertook no other inquiry which would bear upon whether Petitioner knowingly and voluntarily sought to waive his right to counsel. Judge O'Rourke made no attempt to advise Petitioner of the advantages and privileges associated with being represented with counsel, and of the disadvantages and dangers associated with self-representation in a capital murder case. Compare 11 R.T. [4-8-87] 33-50 (Judge Tharp engaged in dialogue with Petitioner to advise him of factors necessary to make an informed and voluntary choice to represent himself and waive his right to counsel, and Petitioner acknowledged his understanding of Judge Tharp's advice in that regard).

Once Petitioner was found competent to stand trial, the issue before the trial court was no longer whether due process required that Petitioner be protected from proceeding to trial without the aid of counsel. Rather, under Moran, 113 S. Ct. 2680 (1993), the sole remaining issue on Petitioner's attempt to assert his right to represent himself pursuant to Faretta was whether the Petitioner's

waiver of his right to counsel was "knowing and voluntary." The inquiry conducted by the trial court, which included only the taking of psychiatric testimony regarding Petitioner's state of mind, was insufficient to determine whether Petitioner's waiver of his right to counsel was "knowing and voluntary." The record reflects that at least at one point in time, approximately nine months prior to Judge O'Rourke's decision to deny Petitioner's request under Faretta to represent himself, Petitioner understood the dangers and disadvantages associated with self-representation and voluntarily waived his right to counsel. See 11 R.T. [4-8-87] 33-50. In addition, as Respondent concedes, "Judge O'Rourke believed Naddi to be intelligent, well-educated and capable as long as Naddi was not laboring under delusions which might interfere with his mental capacity." Respondent's brief, p. 66 (referring to 13 R.T. [9-18-87] 46).

The trial court's finding that Petitioner could not make a knowing and voluntary waiver of his right to counsel was based upon an the application of an incorrect standard of law. The trial court's finding that Petitioner was "incompetent" to waive his right to counsel is *per se* inconsistent with the jury's finding that Petitioner was competent to stand trial in light of the authority of Moran v. Godinez, 113 S. Ct. 2680 (1993). The trial court made no further inquiry of Petitioner regarding his knowledge of the risks and consequences of representing himself, did not ascertain whether the Petitioner understood those risks and consequences, and did not determine whether Petitioner's request to represent himself pursuant to Faretta was asserted with full knowledge and understanding of those risks and consequences.

For all of these reasons, the trial court's conclusion that Petitioner's waiver of his right to counsel, and assertion of his right to self-representation, was not voluntary and intelligent was erroneous. "The improper denial of the right to self-representation is *'per se* prejudicial error' and thus requires automatic reversal of a criminal conviction." United States v. Arlt, 41 F.3d 516, 524 (9th Cir. 1994)(quoting Savage v. Estelle, 924 F.2d 1459, 1466 (9th Cir.

1990), *cert. denied*, 501 U.S. 1255 (1991)); see also Adams v. Carroll, 875 F.2d 1441, 1445 (9th Cir. 1989) ("The denial of the right to self-representation is not amenable to harmless error analysis."). Therefore, it is the recommendation of this Court that the Petitioner's application for a Writ of Habeas Corpus, based upon his claim that he was denied his right to self-representation, should be GRANTED, that Petitioner's conviction should be reversed, and the case should be remanded for a new trial.

5. The Record on Appeal

Respondent filed a notice of lodgment in this case, lodging the Clerk's transcript (7 volumes) and the Reporter's transcript (150 volumes). The materials lodged with the Court filled six boxes, were in no specific order, and were indexed in no way.

The Court finds that very few of the items lodged are of any relevance to the issues presented in Petitioner's application. Therefore, this Court hereby recommends that the items listed in the attached Appendix A be retained as part of the Court's record in this case, and be the sole record for consideration in this case. This Court further recommends that all remaining items, as listed in the attached Appendix B, be stricken from the record in this case and returned to Respondent to be maintained during the pendency of this matter.

Conclusion

It is the recommendation of this Court that Petitioner's application for a Writ of Habeas Corpus based upon his claims that his conviction was obtained in violation of double jeopardy when the second and third sanity phase trials were mistried should be DENIED. In addition, it is this Court's recommendation that Petitioner's application for a Writ of Habeas Corpus based upon his claim that he was denied effective assistance of counsel should be DENIED. It is this Court's further recommendation that Petitioner's application for a Writ of Habeas Corpus based upon

his claim that he was denied his right to self-representation should be GRANTED, and that the case should be reversed and remanded for a new trial. Finally, it is this Court's recommendation that the lodged items listed in the attached Appendix B should be stricken from the record in this case and returned to Respondent as indicated, and that the lodged items listed in the attached Appendix A should be deemed the sole record for consideration in this case.

This report and recommendation of Magistrate Judge Battaglia will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty (30) days after this report and recommendation is mailed, any party may file written objections with the Court. The document should be captioned "Objections to Report and Recommendation." Failure to file objections within the specified time may waive the right to appeal the District Court's Order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: 1/23/96

ANTHONY J. BATTAGLIA
United States Magistrate Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TOUFIC BADIH NADDI,
Petitioner,

v.

D.R. HILL, WARDEN,
Respondent.

No. 95-cv-0022 J (AJB)

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATIONS; CONDITIONALLY GRANTING WRIT OF HABEAS CORPUS
Filed April 29, 1996

I. Introduction

Petitioner Toufic Badih Naddi filed a Petition for a Writ of Habeas Corpus complaining of several errors in the state court proceedings that led to his conviction. Mr. Naddi argued that his conviction was obtained in violation of double jeopardy, that his counsel failed to provide effective assistance, and that his right to self-representation had been wrongly denied.

After full briefing by the Petitioner and the Respondent, Magistrate Judge Anthony J. Battaglia filed a Report and Recommendation (the "Magistrate's Report") rejecting all but one of these contentions, and recommending a new trial. Petitioner and Respondent have both filed objections. The objections together cover the Magistrate's entire Report, requiring this Court

to review de novo all findings and recommendations. 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate."). The Court has reviewed the record, the Magistrate's Report, and the objections by both sides. For the reasons stated below, the Court adopts some of the Magistrate's Report's findings and all of its recommendations, and rejects all objections.

II. First Double Jeopardy Claim

Petitioner's first objection relates to the motion for mistrial made by defense counsel at the conclusion of the second sanity phase trial. Following the prosecutor's highly prejudicial comments during closing argument, defense counsel moved for declaration of a mistrial. The prosecutor opposed the motion and recommended that the court administer a curative instruction. The trial court declared a mistrial.

Petitioner argues that his subsequent retrial violated double jeopardy because the prosecutor had deliberately goaded defense counsel into moving for a mistrial. Although generally a defense request for mistrial does not implicate double jeopardy, double jeopardy would bar a retrial where the prosecutor deliberately goaded the defense into moving for a mistrial in order to subvert the protections of the double jeopardy clause. Oregon v. Kennedy, 456 U.S. 667, 675 (1982).

The question is intent; its existence is a factual determination. Id. As a factual determination, it is entitled to presumption of correctness so long as it was made by a state court of competent jurisdiction after a hearing on the merits of the issue. 28 U.S.C. § 2254(d). That the finding of no intent in this case was made by a court of appeals rather than the trial court is of no significance: section 2254(d) "makes no distinction between factual

determinations of a state court and those of a state appellate court," and imposes no procedural requirements other than that "the habeas applicant and the State or its agent be parties to the state proceeding and the state-court determination be evidenced by a 'written finding, written opinion, or other reliable and adequate written indicia.'" Sumner v. Mata, 449 U.S. 539, 546 (1980).

The state appellate court considered Naddi's argument that an inference of intent should be drawn from the fact that the State's case was not going well, but found that inference outweighed by the strength of the first factor. See Respondent's Answer, Exhibit 1, at 23-24. Petitioner argues that the Magistrate erred in accepting this finding without reviewing the entire record de novo to determine: (1) whether the State objected to the motion, (2) whether the State's case was going badly, and (3) whether the State would have gained an advantage from a new trial. See United States v. Lun, 944 F.2d 642, 644-46 (9th Cir. 1991) (setting forth three common indicators of intent).

Under section 2254(d), a state court finding is presumed correct "unless one of the circumstances listed in 28 U.S.C. § 2254(d)(1)-(7) exists, unless the determination is not fairly supported by the state court record, or unless the petitioner shows by convincing evidence that the factual determination by the state court is erroneous." Tinsley v. Borg, 859 F.2d 520, 525 (9th Cir. 1990) (citations omitted), cert. denied, 498 U.S. 1091 (1991).

The Magistrate's Report reviews the record surrounding the incident of misconduct and concludes that it "cannot say that the court of appeal's finding of lack of intent on the part of the prosecutor . . . is unsupported by the record." Magistrate's Report at 7. Based upon this determination, the Magistrate's Report recommends that the Petitioner's application for the Writ be denied. Id. However, in reviewing a state court factual finding, the federal court must determine not only whether the presumption of correctness applies, but also whether the Petitioner

has rebutted this presumption by "by convincing evidence." Tinsley, 895 F.2d at 525; see also Lafferty v. Cook, 949 F.2d 1546, 1549 n.1 (10th Cir. 1991) ("The presumption of correctness is not irrebuttable."), cert. denied, 112 S.Ct. 1942 (1992). The Magistrate's Report's analysis of the Petitioner's first ground for granting the writ reflects only the first step in the section 2254(d) analysis and not the second. Compare Magistrate Report at 11-12 (conducting de novo review of the record even after finding trial court's factual findings supported by the record).

However, this Court's review of the record indicates that the Petitioner's evidence does not meet the convincing evidence standard. Petitioner supplies an analysis of several factors discussed in the dissent to Oregon v. Kennedy, and argues from these that the inference of intent to provoke a mistrial is unavoidable. The Court disagrees. Even granting the petitioner that the evidence the prosecution had put on to that point was not so strong as to foreclose a jury verdict of insanity, this Court, like the state court of appeals, finds the strongest circumstantial evidence of intent to be found in the prosecutor's comments in trying to avoid a mistrial: the prosecutor's explanation of the origin of the offending statement, as an idea provided during the lunch break by one of the prosecution's experts; and his attempts to explain away the prejudicial effect of his comments. This convinced the trial court itself that the comments were made without intent to provoke a mistrial, see 43 R.T. [8-8-89] 8297 ("I'm sure that you don't want to retry the case any more than anyone else does, Mr. Boles, that is probably so. Misconduct does not require intent. It can come about by negligence as well."); it convinced the Fourth Appellate District, see Respondent's Answer, Exhibit 1, at 23-24; and it leads this Court to reject the Petitioner's arguments that the inference of intent must be accepted. In short, the Petitioner's evidence fails to convince this Court that the state court finding of no intent was erroneous.

III. Second Double Jeopardy Claim

Petitioner's second objection is based upon the trial court's declaration of a mistrial in the third sanity phase trial. The court declared a mistrial because of several juror's exposure to prejudicial publicity. Because Petitioner did not personally consent to the motion for mistrial, double jeopardy would bar his retrial unless it was required by "manifest necessity." Weston v. Kernan, 50 F.3d 633, 638 (9th Cir. 1995). Manifest necessity may be found if either (1) proceeding with the empaneled jury would have been reversible error; or (2) the trial court properly exercised its discretion in declaring a mistrial. Id.

The trial court found that four jurors read all or part of an article in the San Diego Union that reported the following prejudicial information: (1) Petitioner's new wife's opinion that Petitioner had been insane at the time that he had killed his previous wife and family; (2) that he had spent time in a mental hospital in San Bernardino; and (3) that this was his third trial. 48 R.T. [2-1-90] 12813, 12819-20. Seven jurors and two alternates at least viewed the headline, together with the "teaser" link to another article reporting that a murderer of three had been given the death penalty. Id. at 12833 (final count). Two jurors were evasive when questioned about the scope of their exposure to the article; one of these jurors was identified by other jurors as having told other jurors about the existence of the article. Id. at 12813-14.

The Court disagrees with the Magistrate's finding that the trial court correctly found actual prejudice requiring the declaration of a mistrial to avoid reversible error. Actual prejudice requires that the publicity have had the effect of forming an actual opinion in the mind of one or more jurors that they would not be able to set aside. Jeffries v. Bodgett, 5 F.3d 1180, 1189 (1993); Irvin v. Dowd, 366 U.S. 717, 723 (1960). The record does not reveal questions and answers of the individual jurors sufficient to support a finding of actual prejudice.

The question is therefore simply whether the trial court correctly exercised its discretion in .declaring a mistrial. A trial court properly exercises its discretion if it (1) hears the position of the parties with regard to a mistrial, (2) considers alternatives, (3) acts deliberately as opposed to abruptly, and (4) determines whether the defendant would benefit from a mistrial. Weston, 65 F.3d at 638-39. The level of deference accorded the trial court's discretionary decisions varies by context; the decision on whether to declare a mistrial based on juror bias is accorded "'the highest degree of respect' and deference." Id. at 638 n.3 (quoting Arizona v. Washington, 434 U.S. 497, 510 (1978)).

The record reveals that the trial court entertained extensive argument from both sides as to the necessity for granting a mistrial. 48 R.T. [2-1-90] 12815-37. The trial court considered alternatives such as admonishing the jury, or challenging individual jurors, id. at 12832, but rejected these as unlikely to be effective, id. at 12838, or impossible given the number of jurors exposed to the prejudicial information, id. at 12832-34. The trial court acted carefully, polling each of the jurors, considering caselaw and the arguments of counsel, and taking a short recess before rendering its verdict. Id. at 12812, 12837. The trial court weighed the effect of the publicity, taking into account that some aspects of the publicity might be favorable to the defendant (e.g., the statements by his new wife that she believed he had been insane at the time of the killings, and his admittance to a mental hospital), while other aspects of the publicity might be detrimental (e.g., the comparison to another mass killer implied by the "teaser" link, and the revelation that this was Petitioner's third trial).
Id. at 12820, 12817-18. The trial court's main concern was with the expressions of shock by all jurors who had been exposed to the information that Petitioner had remarried. The court was concerned that this shock, which the jurors were unable to explain, might be rooted in their antagonism to the idea of this defendant "walking out the door" should they find him not guilty by reason of insanity. Id. at 12835-37. In sum, the record supports the

conclusion that the trial court followed each of the enumerated factors in exercising its discretion.

The Court agrees with the Magistrate that the trial court's exercise of its discretion was proper. This ground for granting the writ of habeas corpus is therefore rejected.

IV. Ineffective Assistance of Counsel Claim

Petitioner's ineffective assistance of counsel argument is dependent upon the previous two arguments. Petitioner argues that he was denied effective assistance of counsel when his trial counsel failed to enter "once in jeopardy" claims upon the declarations of mistrial in the second and third sanity phase trials. However, as the above analysis indicates, a double jeopardy argument at either stage would have failed. It is doubtful, therefore, that Petitioner could satisfy the "unprofessional conduct" prong of the ineffective assistance of counsel standard, and certain that he cannot satisfy the "prejudice" prong of the standard. Strickland v. Washington, 466 U.S. 668, 693-94 (1984) (requiring proof of "a probability sufficient to undermine confidence in the outcome" that "but for counsel's unprofessional errors, the result of the proceeding would have been different"). This ground for granting the writ of habeas corpus is therefore rejected.

V. Claim of Denial of Right to Self-Representation

Petitioner's final claim relates to the denial of his request to represent himself in the guilt phase of the trial. The Magistrate's Report finds that the trial judge applied too high a standard to determine whether Petitioner was competent to waive counsel, and conducted insufficient inquiry to determine whether Petitioner could effectively waive his right to counsel. The State argues that notwithstanding these errors, the Petitioner's waiver could not have been "knowing and voluntary" because it was a product of mental illness.

A criminal defendant has the right to waive the appointed counsel the constitution guarantees him, and to represent himself at trial. Faretta v. California, 422 U.S. 806, 807 (1975). Competency to stand trial implies competency to waive the right to counsel. Godinez v. Moran, 113 S.Ct. 2682 (1993) (holding that the standards are the same). Competency, however, only ensures that the defendant has the ability to waive. A waiver is effective only if it was "knowing and voluntary." Id. at 2687-88 and 2687 n.12.

The trial judge, relying upon Curry v. Superior Court, 75 Cal. App. 3d 221 (1977), limited his waiver inquiry to the opinions of six psychiatrists on whether the Petitioner was "free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary." 18 R.T. [2-8-88] 532. Three psychiatrists opined that the Petitioner's waiver was based on a paranoid delusion that his wife's family and the district attorney had corrupted his attorneys. See 17 R.T. [2-4-88] 435-46 (Dr. Duff); id. at 442-44, 526 (Dr. Klatte); 18 R.T. [2-8-88] 597 (Dr. Rappaport). Three opined that the Petitioner's waiver was based not upon delusion but rather upon culture, misperceptions, or disagreement with counsel over the conduct of his defense. See id. at 534 (Dr. Vargas); id. at 539 (Dr. Hansen); 19 R.T. [2-9-88] 855-88 (Dr. Sharma). Based upon these opinions alone, the trial judge found that Petitioner lacked the capacity to make a valid waiver.

The Magistrate's Report correctly concludes that the trial judge applied the wrong legal standard. Curry relied upon the now-debunked theory that "a distinction exists between competency to stand trial and competency to make a knowing and intelligent waiver of the right to counsel." Curry, 75 Cal. App. 3d at 227. In his ruling on Petitioner's request to represent himself, the trial judge expresses sole reliance on Curry, and phrases his inquiry in terms of "whether Mr. Naddi is competent to waive his right to counsel." 21 R.T. [2-18-88] 969. This is error. See Moran v. Godinez, 57 F.3d 690, 698 (9th Cir. 1994) ("Because the two

standards are identical, one finding of competence suffices for both."), cert. denied sub nom. Moran v. McDaniel, 116 S.Ct. 479 (1995). The jury's determination that Mr. Naddi was competent to stand trial necessarily meant that the was competent to waive trial counsel: the issue was whether he had "knowingly and voluntarily" entered his waiver.

The trial judge found that Mr. Naddi's desire to discharge his counsel came from his irrational belief that his counsel had been corrupted to work for the interests of his former wife's family, and concluded that this delusion rendered him incapable of making a "free and knowing waiver of his right to counsel." 21 R.T. [2-18-88] 970. The State's argument in support of this ruling essentially argues that Petitioner's waiver cannot be considered "knowing and voluntary" because it was a product of his delusion.[1/]

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1. The State's objections borrow extensively from Judge Pregerson's dissent in Moran, in which he argued that the mental state of the accused is relevant not only to the determination of competence, but also to whether the waiver was knowing and voluntary. See Moran, 57 F.3d at 704 (arguing that mental state should be considered as possibly "subverting" the choice to waive counsel).

Support for this approach might also be found in two recent federal cases. Judge Johnston in the Eleventh Circuit recently suggested that an effective waiver might not be found where a defendant's personality disorder caused him to "overestimate and overstate his abilities," calling into question his understanding of the charges and penalties he faced, and his decision to continue in the face of the "district court's general admonitions that such a course was unwise." United States v. Cash, 47 F.3d 1083, 1190 (11th Cir. 1995). Similarly, Judge Wright in the Western District of Missouri recently granted a writ of habeas corpus where the trial court found an effective waiver despite psychiatric testimony that the petitioner had a personality disorder that rendered him incapable rationally evaluating consequences. Wilkins v. Delo, 886 F. Supp. 1503, 1512 (W.D. Mo. 1995).

This approach would subvert Moran by using waiver analysis to add a second level of psychiatric competency evaluation. Moran, however, equated the standard to stand trial with the standard to waive counsel because of its belief that the waiver decision was no different than the other decisions all defendants are required to independently execute at trial, such as the entry of guilty pleas. See Moran, 113 S.Ct. at 2686-87; see also id. at 2690 ("At common law, therefore, no attempt was made to apply different competency standards to different stages of criminal proceedings or to the variety of decisions that a defendant must make during the come of those proceedings.") (Kennedy, J., concurring in part and concurring in judgment). This necessarily implies that a finding that a defendant is competent to stand trial means that the defendant is able to understand and voluntarily render a decision as to whether he should represent himself.[2]

Support for this conclusion may also be found in the Ninth Circuit's treatment of Moran's ineffective assistance of counsel claim on remand from the Supreme Court. The claim was based upon Moran's counsel's failure to procure psychiatric reports specific to issue of his ability to waive counsel. The majority rejected this ground, stating that testimony as to general competence need not be supplemented with testimony specific to the ability to waive trial counsel. Moran, 57 F.3d at 699-700. The majority limited its waiver inquiry to whether the defendant appeared to understand the charges against him, the possible penalties, and the dangers of self-representation.[3]

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2. Thus the district court's holding in Wilkins that a defendant found competent to stand trial could not make an effective waiver because he "did not engage in a true decision-making process," 886 F. Supp. at 1512, was "incapable of making the decision . . . through appropriate reasoning," id., or was unable to "anticipate consequences and use judgment," id., was error.

3. The Supreme Court's citations to cases to elucidate the concept of effective waiver support the inference that the question is simply whether the defendant in fact understands the choice he is

Almost every choice to waive counsel could be said to be a product of some delusion on the part of the defendant. Cf. Faretta, 422 U.S. at 834 ("To force a lawyer on a defendant can only lead him to believe that the law contrives against him."; speculating that in some "rare" cases the pro se litigant might actually do better than a trained attorney); id. at 852 (Blackmun, J., dissenting) (citing the old proverb that "one who is his own lawyer has a fool for a client"). Once a defendant has been found competent to stand trial, however, the issue is simply whether the defendant understands the full ramifications of his decision and makes the decision without coercion from outside influences. See Moran, 57 F.3d at 698 (trial court should establish whether defendant is "aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation"); see also Faretta, 422 U.S. at 835 (the defendant should be made "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his decision is made with open eyes") (citation and internal quotation marks
omitted).

The trial judge conducted absolutely no inquiry of the defendant. The Magistrate's Report concludes from this that the trial court had an insufficient factual background to find that his waiver was ineffective. The Court agrees.

The Court finds the record insufficient to answer the question of whether the Petitioner understood "the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation," and was not making his waiver as a product of any outside coercive forces. Moran, 57 F.3d at 698. Accordingly, the Court must conclude that the rejection of the Petitioner's waiver of his right to counsel was error. This error automatically requires reversal of his conviction. United States v.

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making. See Moran, 113 S.Ct. at 2687 n.12.

Arlt, 41 F.3d 516, 524 (9th Cir. 1994); Adams v. Carroll, 875 F.2d 1441, 1445 (9th Cir. 1989).

CONCLUSION AND ORDER

Toufic Badih Naddi's Petition for the Writ of Habeas Corpus is conditionally granted. The Writ shall become unconditional and permanent unless the State of California commences proceedings to afford Naddi a trial within sixty days of the date of this Order.

IT IS SO ORDERED.

DATED: April 29, 1996

NAPOLEON A. JONES, JR.
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TOUFIC BADIH NADDI,
Petitioner,

v.

D.R. HILL, WARDEN,
Respondent.

No. 95-cv-0022 J (AJB)

ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING EX PARTE APPLICATION FOR A STAY
Filed May 16, 1996

This Court's April 29, 1996 Order granted Petitioner Naddi's request for the writ of habeas corpus unless the state began new trial proceedings within sixty days. The State asks the Court to reconsider that ruling in light of the new Antiterrorism and Effective Death Penalty Act of 1996 (the "Act"), and to reconsider the form of its order. The State has also requested a stay on the April 29 Order pending the hearing date of June 10, 1996. Having examined the State's moving papers, the Court finds no reason to wait for an opposition. The Court denies the State's motion and its application for a stay.

1. Effect of Antiterrorism and Death Penalty Act of 1996

The State argues that under the Act's more deferential standard of review for state court applications of federal law, Naddi's conviction must stand.

The Act modifies 28 U.S.C. § 2254 to prevent the granting of the writ of habeas corpus for legal error "unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). The Court agrees with the State that this provision of the Act "speak[s] to the power of the court rather than to the rights or obligations of the parties," so its application to pending cases would be prospective, not "retroactive." See Landgraf v. USI Film Products, 114 S.Ct. 1483, 1502 (1994) (citation omitted).

The legal error involved in this case is that the state courts applied two different standards of competency to the questions of whether Naddi was competent to stand trial and whether he was competent to waive counsel at that trial. The State argues that because the trial court acted before the Supreme Court announced that the two standards were the same in Godinez v. Moran, 113 S.Ct. 2682 (1993), its decision cannot be contrary to "clearly established Federal law, as determined by the Supreme Court." This is factually incorrect. The Supreme Court issued its opinion on June 24, 1993. While the trial court's decision was entered on February 18, 1988, the opinion of the Fourth Appellate District was entered on January 7, 1994, well after Godinez. The Fourth Appellate District opinion approvingly comments that the trial court "applied the proper legal standards in evaluating Naddi's competency to make a choice concerning self-representation and applied it to substantial psychiatric evidence showing he lacked that competency." See Respondent's Answer, Exhibit 1, at 33-34. As of the day it issued, this decision was contrary to clearly

established law as determined by the Supreme Court of the United States.

This case does not require the Court to resolve the questions that have been raised about the constitutionality of the deferential standard of review required by the Act:[1] even measured against the more deferential standard, the state court judgment cannot stand.

II. Request to Modify Order

The Court's Order granting the writ of habeas corpus was conditioned on the state court's failure to commence new trial proceedings within sixty days. The State argues that the Court should not order a new trial until Naddi makes a request for self-representation. Alternatively, the State asks that the Court change its order conditioning the writ on the failure to begin a new trial to an order for a "limited remand."

The State admits that it has "found no authority on point" for its argument that the denial of a defendant's right to self-representation does not require reversal unless the defendant demands to represent himself in any subsequent proceeding. The Court disagrees that it would be a "miscarriage of justice" or allow the defendant a "second bite of the apple" to permit him to proceed at his second trial represented by counsel. Whatever Naddi chooses to do with his right today, he may not be confined on the basis of a proceeding rendered illegitimate by a structural error. Cf. Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993) (structural errors infect entire trial process and require automatic reversal).

The State's final argument is that the Court should order a "limited remand" to permit the state court to apply the correct

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1. See 142 Cong. Rec. S3438-43 (daily ed. Apr. 17, 1996) (statement of Sen. Moynihan).

legal standard to Naddi's request to represent himself. The Ninth Circuit has approved of a limited remand in place of reversal of a conviction in two situations: (1) where the record is developed but the trial court did not clearly apply the correct legal standard on the record, and (2) in order to supplement a factual record devoid of evidence on a key issue. See United States v. Kimmel, 672 F.2d 720, 722 (9th Cir. 1982); id. at 723-27 (Reinhardt, J., concurring in part and dissenting in part). Neither purpose would apply to this case. The record reveals that prior to Judge O'Rourke's competency determination, Judge Tharp had conducted a full investigation into whether Naddi was making his choice free of outside coercive forces and whether Naddi understood "the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation." 11 R.T. [4-8-87] 33-50; Moran v. Godinez, 57 F.3d 690, 698 (9th Cir. 1994). Thus the existing record supports the conclusion that Naddi did make an effective waiver of his right to counsel. This does not demonstrate with absolute certainty that Judge O'Roarke's evaluation of Naddi several months later would have resulted in the same conclusion; however, it is better evidence than would be produced by a limited remand for purposes of developing a factual record today.

CONCLUSION AND ORDER

The State's motion for reconsideration and its application for a stay are denied.

IT IS SO ORDERED.

DATED: May 15, 1996

NAPOLEON A. JONES, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOUFIC NADDI,
Petitioner-Appellant,

v.

D. R. HILL; DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Respondents-Appellees.

No. 96-55755
D.C. No. CV-95-00022-NAJ

TOUFIC BADHI NADDI,
Petitioner-Appellee,

v.

D. R. HILL; DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Respondents-Appellants.

No. 96-55791
D.C. No. CV-95-00022-NAJ

MEMORANDUM*
Filed June 9, 1998

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Submitted June 5, 1998**
Pasadena, California

Before: HUG, Chief Judge, KOZINSKI, Circuit Judge
and FITZGERALD,*** District Judge.

The district court did not err in granting the writ on the self-representation issue. Both state courts relied on a distinction between competency to stand trial and competency to waive the right to self-representation, and the appellate court decision came after the Supreme Court held there is no distinction between the two standards. See Godinez v. Moran, 509 U.S. 389 (1993). Moran implies that a judge relying on psychiatric evidence must carefully distinguish between competence to make a waiver and whether a defendant has actually made a knowing and voluntary waiver. The state courts ultimately used an incorrect standard by finding that Naddi was incompetent to waive counsel. However, a prior state trial judge, Judge Tharp, did investigate whether Naddi knowingly and voluntarily waived the right to counsel, and found that he had. The denial of Naddi's right to self-

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

***The Honorable James M. Fitzgerald, United States District Court for the District of Alaska, sitting by designation.

representation requires reversal and is not subject to harmless error analysis. See United States v. Arlt, 41 F.3d 516, 524 (9th Cir. 1994). The State claims that the district court erred by requiring a new trial rather than remanding to state court for a determination of whether, under the correct legal standard, Naddi made a knowing and voluntary waiver. As Judge Tharp found, however, Naddi did knowingly and voluntarily waive his right to counsel, and the State offers no persuasive reason for us to set aside this finding. The State's argument that AEDPA applies is contrary to Lindh v. Murphy, 117 S. Ct. 2059 (1997).

The district court was also correct in denying Naddi's other claims. The trial court did not find that the prosecutor intended to provoke the second sanity phase mistrial. The state appellate court did find that the prosecutor lacked such a motive, and the record fairly supports that finding. See 28 U.S.C. § 2254(d). For Naddi's third sanity phase trial we apply our four factor test for whether the trial court properly exercised its discretion to declare a mistrial over the defendant's objection. See Weston v. Kernan, 50 F.3d 633, 639 (9th Cir. 1995). First, the trial court heard the position of the parties with regard to mistrial. Naddi confuses listening to his position, which the trial court did, with accepting it, which it didn't. Second, the trial court considered alternatives to a mistrial, including admonishment and challenging individual jurors. Third, it acted quite deliberately. Indeed, Naddi concedes the court didn't act abruptly, but argues it wasn't deliberative because it didn't agree with him--a mistake much like that he makes on the first factor. Fourth, the trial court determined the defendant would benefit from a mistrial. Thus, the trial court did not abuse its discretion. Finally, the district court correctly observed that Naddi's ineffective assistance of counsel claims are parasitic on his double jeopardy claims. Since there were no double jeopardy violations, it wasn't ineffective assistance to fail to raise double jeopardy.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOUFIC NADDI,
Petitioner-Appellant,

v.

D. R. HILL; DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Respondents-Appellees.

No. 96-55755
D.C. No. CV-95-00022-NAJ

TIPHOOK BADHI NADDI,
Petitioner-Appellee,

v.

D. R. HILL; DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Respondents-Appellants.

No. 96-55791
D.C. No. CV-95-00022-NAJ

ORDER
Filed July 27, 1998

Before: HUG, Chief Judge, KOZINSKI, Circuit Judge and FITZGERALD,* District Judge.

The panel has voted to deny the petitions for rehearing. The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote thereon. Fed. R. App. P. 35(b). The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

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*The Honorable James M. Fitzgerald, United States District Court for the District of Alaska, sitting by designation.

ORIGINAL

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Nos. 98-371
98-5899

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997-1998

D.R. HILL, Warden, et al., Petitioners,

v.

TOUFIC BADIH NADDI, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent's Brief In Opposition To Petition For Writ Of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court exersice its descretion to grant review, where the matter involves clearly settled issues of law?

II. Should this Court exercise its discretion to grant review to detrmine whether a "structural error" is subject to harmless-error analysis?

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REASONS WHY THE PETITION SHOULD BE DENIED

I. **This Court Should Deny Petitioners' [State] Petition for a Writ of Certiorari Because The Question of Whether a Defendant Who is Competent to Stand Trial is Also Competent to Waive the Right to Counsel is Clearly Settled Law** (Sup Ct R. 10 (d)).

The United States Court of Appeals for the Ninth Circuit has correctly affirmed the district court's order granting the writ of habeas corpus based on the claim that respondent [Naddi] was denied his right to self-representation under the Sixth Amendment to the United States Constitution. The Ninth Circuit relied on Godinez v. Moran, 125 L Ed 2d 321 (1993), for the proposition that there is no distinction between competency to stand trial and competency to waive counsel. See State's Appendix at p. A-82.

The State's argument is contradictory because it concedes, on the one hand, that a defendant who is competent to stand trial is also competent to waive counsel, but, on the other hand, requests that the trial court should be permitted to conduct a separate psychiatric hearing to determine whether the defendant is competent to waive counsel.See Petition at p. 7-8. In addition to the State's mistatement of the law, it mistates the facts.

Here, the Ninth Circuit affirmed the district court because the trial judge, relying upon Currry v. Superior Court, 75 Cal App 3d 221 (1977), limited his waiver inquiry to the opinions of six

psychiatrists on whether Naddi was "free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary." 18 R.T. [2-8-88] 532. Three psychiatrists opined that Naddi's waiver was based on paranoid delusion that his wife's family and the district attorney had corrupted his attorneys. 17 R.T. [2-4-88] 435-46 (Dr. Duff); id. at 442-44, 526 (Dr. Klatte); 18 R.T. [2-8-88] 597 (Dr. Rappaport). Three opined that Naddi's waiver was based not upon delusion but rather upon culture, misperception, or disagreement with counsel over the conduct of his defense. See id. at 534 Dr. Vargas); id. at 539 (Dr. Hansen); 19 R.T. [2-9-88] 855-88 (Dr. Sharma). Based on these opinion alone, the trial judge found that Naddi lacked the capacity to make a valid waiver.

The district court found that the trial judge applied the wrong legal standard. Curry relied upon the now-debunked theory that 'a distinction exists between competency to stand trial and copetency to make a knowing and intelligent waiver of the right to counsel.' Curry, 75 Cal App 3d at 227. In his ruling on Naddi's request to represent himself, the trial judge expresses sole reliance on Curry, and phrases his inquiry in terms of "whether Mr. Naddi is Competent to waive his right to counsel." 21 R.T. [2-8-88] 969. This is an error. See Moran v. Godinez, 57 F 3d 690, 698 (9th Cir. 1994). ("Because the two standards are identical, one finding of incompetence suffices for both."), cert. denied sub nom. Moran v. McDaniel, 116 S. Ct. 479 (1995). The jury's determination that Mr. Naddi was competent to stand

trial necessarily meant that he was competent to waive counsel: the issue was whether he had "knowingly and voluntarily entered his waiver." See State's Appendix at A-72-73.

The district court found that the trial, judge O'rourke, conducted absolutely no inquiry of whether Naddi had knowingly and voluntarily entered his waiver. Therefore, the district court found the record insufficient to answer the proper and sole required inquiry of whether Naddi understood the "nature of the charges against him, the possible penalties, and the dangers and disadvatages of self-reresentation," and was not making his waiver as a product of outside coersive forces." Accordingly the district court concluded, and the Ninth Circuit affirmed, that the rejection of Naddi's waiver of his right to counsel was error which automatically requires reversal of his conviction. See the State's Appendix at A-73; A-82-83.

As for the approach taken by the Eighth and Eleventh Circuits in United States v. Cash, 47 F 3d 1083, 1088(11th Cir. 1995); Wilkens v. Bowersox, 145 F 3d 1006 (8th Cir. 1998),[*1] for the proposition that a defendant's mental health is an appropriate consideration when a court determines whether a waiver of the right to counsel is knowing and voluntary, both Circuits have misapplied Godinez because they require that a defendant waiving the right to counsel to have greater power of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney. For example, in United States v. Cash, 47 F 3d 1083, the Eleventh Circuit enumerated factors to be considered when determining whether a record establishes a knowing , voluntary,

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[*1] The facts are identical to those in Godinez,supra, at 327,328.

and intelligent waiver. Among other things, the defendant's education; physical and mental health; understanding of rules of procedure and evidence; experience in criminal trials. Petition 7-9.

This Court has rejected the argument that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. Godinez at 332. It was further emphasized that the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. In Farettta v. California, 45 L Ed 2d 562, it was held that a defendant choosing self-representation must do so "competently and intelligently," but we made it clear that the defendant's "technical knowledge" is not relevant to the determination whether he is competent to waive his right to counsel..., and we emphasized that although the defendant may conduct his own defense ultimately to his own detriment, his choice must be honored. Godinez at 332-333.

A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to ... waive his right to counsel. In addition to detrmining that a defendant who seeks to waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional right is knowing and voluntary... the focus of the "knowing and voluntary" inquiry ... is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Godinez at 333.

In other words, a defendant waiving counsel must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Godinez at 333 fn. 12.

In short, because the legal issue of whehter psychiatric evidence is required to determine the waiver of counsel is settled law, this Court should not grant review.

II. This Court Should Deny Review, Where the Issue of Whether Self-representation is a "Structural Error" Which Defies Analysis by harmless-error standard has been clearly settled law

This Court has, contrary to the State's argument, put forth a persuasive rationale why a reversible per se rule applies when a defendant is precluded from self-representation. The question simply turns on whether the error is a "trial error" or a "structural error". This Court explained:

> "Trial error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial... At the other end of the spectrum of constitutional errors lie structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error-standards ...the existance of such defects- deprivation of the right to counsel, for example, requires automatic reversal of the conviction because they infect the entire trial process." Brecht v. Abrahamson, 123 L Ed 2d 353, 367.

In this case, the deprivation of the right to self-representation has been classified as a sturctural defect in the constitution of the trial mechanism. See McKaskle v. Wiggins, 465 U.S. 168, 177-78. Therefore, it defies analysis by harmless-error

standard and reversible per se rule applies. See Arizona v. Fulminante, 499 U.S. 279 at p. 331 (1991). In addition, the district court found that "whatever Naddi chooses to do with his right today, he may not be confined on the basis of a proceeding rendered illegitimate by a structural error...(structural error infects entire process and requir automatic reversal.) See State's Appendix at A-79.

As for the State's argument that "the anomaly of trying a criminal defendant because he was prejudiced by being compelled to be defended by competent counsel is particularly evident in Naddi's case. The evidence of Naddi's guilt was overwhelming... the only issue of consequence was whether Naddi was sane at the time he committed the murders...having avoided the death penalty ...Naddi was hardly prejudiced by capable representation afforded him.." State's petition at 10-11.

What is anomalous , in the state's argument, is the fact that it does not mention how Naddi was capably represented in the sanity ~~phase of~~ the trial which is "the only issue of consequence", but moves out of order to the penalty phase and defend the capable representation afforded to Naddi when his life was saved. To start with the penalty phase, this is not a death penalty case by any stretch of the imagination. This is a case of humbly educated man who has never done anything wrong in his life. A loving father whose actions were ordained by God to protect his two innocent children from being kidnapped and molested by a known child molester and his body guards.On the other hand, if the child molester was not coming to kidnap and molest Naddi's innocent

children, then neither the capable representation nor anything else could or should save Naddi's life. Indeed, the State does not offer a single example of any exraordinary performance afforded to save Naddi's life. There is none.

Turning backwards to the sanity phase, the quality and quantity of representation offered to Naddi is illustrated by the last two attorneys appointed.*2 In this case, there are two double jeopardy violations and two ineffective assistance of counsel claims which are presently before this Court and which are related to the only "issue of consequence" in this case.

The first double jeopardy violation occurred in the second sanity phase trial when the prosecutor provoked a mistrial to save his case through a racially biased closing argument and at the time the jury could have easily returned with a verdict of not guilty by reason of insanity. See Naddi's Petition for writ of certiorari, Argument I.

The second double jeopardy violation occurred in the third sanity phase trial when the two defense attorneys successfully obtained a mistrial over Naddi's objection and opposition of the people. See Naddi's Petition, Argument III.

Based on the above double jeopardy violations, any inquiry will

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*2 The trial court appointed two attorneys because it was a death penalty case. The number of attorneys appointed or Naddi's dissatisfaction with them is not an issue before this Court. Suffice to say that the trial court relieved or accepted the withdrawal of several attorneys for the busy schedule or for conflict of interest, among other reasons.

reveal that a different result would have been obtained had Naddi been represented by competent counsel. Any reasonably competent attorney would have raised a valid plea of once in jeopardy based on the prosecutor provoking a mistrial through a racially biased argument and at the time the jury could have easily returned with a verdict of not guilty by reason of insanity. See Naddi's Petition, Argument II.

Most certainly, a different result would have been obtained as a matter of law if Naddi were allowed to represent himself in the third sanity phase trial. Naddi and the prosecutor were satisfied with the jury empeneled. It was the defense attorneys' action that caused the improper dismissal of the jury empaneled. As a result, Naddi was denied his constitutionally protected right to the jury empaneled and an opportunity, after years of anxiety, expense, and ordeal, to end the dispute then and there, perhaps, with an acquittal. See Naddi's Petition, Argument IV.

Accordingly, any remand to the trial court, after over thirteen years of subjecting Naddi to trials and appeals, should be to dismiss the case due to the improper denial of the right to self-representation. This denial, prejudiced Naddi and destroyed his chances, complicated the issues, and caused obvious double jeopardy violations.

The Ninth Circuit also correctly found that the record shows that Naddi did knowingly and voluntarily waive his right to counsel and the State does not offer any changing circumstances to set side this finding. Indeed, the only circumstances offered by the State is that, after the first competency hearing, Naddi had been consistently

found competent to stand trial. See State's Petition at 4-5.

In addition, the record shows that the State advocated Naddi's position during the trial. The State took an extraordinary step of filing a petition for a writ of mandate in the Fourth District Court of Appeals, Division One, claiming that Judge O'Rourke had improperly suspended the criminal proceedings because there was insufficient evidence for doubting Naddi's competency, that the appointment of attorney Murphy was improper becase he was biased against Naddi..., and that Judge O'Rourke's conduct had a chilling effect upon Naddi's Faretta right of self-representation. The Petition specifically alleged that Judge O'Rourke lacked substantial evidence to initiate a re-examination of Naddi's pro per status. (Court of Appeal No. D007204,Mandate Petition pgs. 3,4,19,28).

CONCLUSION

For the foregoing reasons, the State's Petition for a Writ of Certiorari should be denied.

Dated: 9-25-1998

Respectfully submitted

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Nos. 98-371

98-5899

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997-1998

D.R. HILL, Warden, et al, -Petitioners

v.

TOUFIC BADIH NADDI, -Respondent.

PROOF OF SERVICE

I, TOUFIC BADIH NADDI, do swear or declare that on this date, 9,25 ,1998, as required by Supreme Court Rule 29 I have served the enclosed Respondent's Brief In Opposition To Petition For Writ Of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

110 WEST A STREET # 1100

P.O. BOX 85266- SAN DIEGO , CALIFORNIA 92186-5266

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on 9,25 , 1998

Toufic Naddi

Signature